United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-6161

United States Court of Appeals

For the Second Circuit.

SECURITIES and EXCHANGE COMMISSION,
Plaintiff-Appellee,

against

GALAXY FOODS, INC., ARTHUR LIEBERMAN a/k/a ARTY LEE, RALPH AVNI, CHARLES HOROWITZ, BRUCE KATZ, STEVEN ROTH, MARK GLAZER, IRWIN DONALD KIRSCHENBLATT a/k/a DONALD KIRSCH, GEORGE PADILLA, ARTHUR SHEVACK,
Defendants,

IRWIN DONALD KIRSCHENBLATT, a/k/a DONALD KIRSCH and ARTHUR SHEVACK,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

Volume II—Pages 361 to 854.

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DIRECT EXAMINATION

BY MR. GARMANSKY: (Cont.)

Q Not of each particular session, but an overall training that was given to the new investors consisted of wholesale and retail?

A No, we didn't make that distinction at the basic training. Selling was selling, closing was closing, prospecting was prospecting for customers and/or franchisees, we didn't make that distinction; however, later on in the program, prior to the start of the pilot program, we had retail schools which were only to get customers.

Q NOw, concerning the training sessions, was prospecting discussed at the executive board meeting?

A The fact that prospecting would be in the training session was told-- was discussed, yes. There was no objection that I can remember whatsoever to prospecting being there.

Q Thank you. Now, Mr. Lieberman, could you please describe what techniques were taught to new investors at the training session to recruit others into Galaxy?

A Well, as we mentioned, prospecting was taught. There were different types of prospecting. Cold canvas, ads, approaching people in the street, friends, relatives, business associates in whatever the person was doing full

time.

Q Could you please tell us what the new investors were instructed to say to prospects on the street?

MR. GOIDEL: Objection. It assumes facts not in evidence.

MR. GARMANSKY: I will withdraw the question.

THE COURT: The form is bad. "Were."

Q Mr. Lieberman, were new investors instructed as to approaching strangers on the street?

A They were.

Q What were they instructed?

A They were instructed to introduce themselves, to tell the individual as little as possible about the business and to try to get them to an Opportunity Meeting and/or someplace where they could have time to -- generally it was an Opportunity Meeting, someplace where they had time to be able to explain the business in detail.

Obviously, it couldn't be out on the street.

Q Was anything -- strike that.

Were new investors instructed to say anything concerning money or financial opportunities when they met prospects?

MR. GOIDEL: Your Honor, I'm going to object. We are not concerned with what may have been taught,

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we are concerned with what may have been done on the street. If any clients stand charged with having done anything, they are not being charged with having attended or listened to a lecture.

They are supposedly being charged with having committed fraud out on the street or themselves having committed fraud in speaking to people.

We are not concerned with what was taught them, if anything, but what was actually done.

I move to strike thia line of questioning.

THE COURT: I would take it that the object of this testimony would be to show a course of conduct which began on the street and ended up with something being done.

MR. GOIDEL: Your Honor, we are faced with this problem. I have listened and I have read concerning a lot of conversations, and nowhere does anyone identify who received the information, who gave the information has not been identified.

Frankly, I am working in a vacuum.

THE COURT: Mr. Goidel, you are jumping ahead a little bit because what you are really doing, as I see it, is, in effect, previewing your summation in which you will endeavor to persuade the Court that

the Commission has failed to prove a case.

We don't want to get these things confused. Certainly, the quality of an act, if there eventually is an act, is determined by the entire context in which it occurred.

If your point is we have all context and no act, that is something you can try to persuade me later on--

MR. GOIDEL: I go beyond that. It is not only that we have context and no act, but we don't even know who is saying what to whom.

I think it is incumbent at least, in order to allow me to understand what is being said, that they identify, to as great a degree as possible, the person who made the statement ---

THE COURT: All right. As I told you originally, I am sitting here without a jury and I am taking evidence largely in the belief, if not the hope, that a connection will become apparent.

I have just demonstrated, or thought I did, that I view the need for surrounding context to explain or characterize the quality of acts if acts do occur.

And, moreover, the way this case is presented in the pleadings it is in effect presented as a

sort of scheme in which there are many partipants, each playing a role.

NOw, that's the presentation of it. Whether the proof will eventually support the need for injunctive relief agains your clients is something else again. It will depend on whether the Court is persuaded that they were knowledgeably part of an on-going scheme to do something which the law forbade, and whether under all the circumstances, including that of propensity to commit future acts or engage in a future participation of similar schemes, that's what this list is all about.

I would have to be persuaded by the preponderance of the evidence, a fair preponderance of the evidence that the Commission has made a case.

If it has not then you win.

MR. GOIDEL: Thank you, Judge.

MR. GARMANSKY: I would withdraw the previous question, your Honor.

BY MR. GARMANSKY:

Q Mr. Lieberman, was there anything else that was instructions to the new investors concerning prospecting?

A Well, the real thing, the most important thing

that we tried to get to them was not to go into detail standing on the street corner or wherever they met these people, and that to try to attempt to get these people to a more organized setting for the explanation of the program.

Q A more organized setting, you mean the Opportunity Meetings?

A That was one method, yes.

Q Were these new investors instructed to disclose to prospects there was an investment involved?

A Were they instructed to disclose that there was an investment? No, they were not instructed to disclose that there was an investment.

THE COURT: Would it be fair to say that the technique was to say something to them which would excite their active curiosity?

THE WITNESS: That's exactly it, your Honor.

BY MR. GARMANSKY:

Q Now, Mr. Lieberman --

THE COURT: Excuse me for just a moment.

Usually in terms of holding out an expectation or anticipation that a plan of making money, large amounts of money would be --

THE WITNESS: No large amounts of money -- as a matter of fact, they were instructed not to say,

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"How would you like to earn a million dollars?'

THE COURT: I understand that. But something which held out the prospect --

THE WITNESS: I believe the technique went "Are you earning enough money right now?" Who's going to say that they are earning enough money.

"Well, would you like to have an opportunity to see a business where you could earn perhaps what you are worth rather than what somebody else thinks you are worth?"

THE COURT: I see.

(continued next page.)

Q Mr. Lieberman, were the new investors instructed at training sessions to bring guests to the Opportunity Meetings?

A Yes.

Q What were they instructed concerning this aspect?

A First of all, they were told to pick up the guests. I am not sure I understand, what do you mean by what they were instructed concerning bringing guests?

Q Did the instructors tell the new investors that in order for Galaxy to grow that prospects had to be brought into the Opportunity Meetings?

A Yes.

Q Mr. Lieberman, what is the purpose of what you mentioned not to give any detail to the new prospect on the street, was that discussed at executive board meetings?

A I don't believe it was discussed -- that particular thing was discussed at executive board meetings.

Q Mr. Lieberman, could you tell us what the purpose for this instruction to the new investors not to give a lot of detail to the new prospect on the street?

A Well, they were told that -- first of all, without some method of being able to write down the business plan, it would be very confusing and it would be

ridiculous trying to do that on the street.

Secondly, they might spend a great deal of time with one individual on the street and that certainly wouldn't help them in their business.

As I said, we wanted to get them into a more organized setting where speakers who prepared the program didn't have to read it, knew it by memory, could put the program on the board in a more organized manner.

Also, at the Opportunity Meetings there was the feeling that the prospect would understand there were other individuals who were interested, it wasn't just he alone being approached by one person who he had no credentials on. They could see an office, they could see a warehouse, they could see something there; they could see a company.

Q This prepared program you talked about, that was done by management, was it not?

A No.

Q Prepared presentation for Opportunity Meetings was prepared by management?

A Prepared by management. You said done by management.

Q I am sorry, it was prepared, written and prepared by management?

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A That's correct.

Q Isn't is also a fact that management controlled what was being said at Opportunity Meetings at all times?

MR. GOIDEL: YOur Honor, I would like this witness to define what he understands "management" to mean.

THE COURT: Let's have, Mr. Lieberman, you define management as persons involved. In other words, you are really saying that management wrote the script.

THE WITNESS: Right.

THE COURT: Who were the authors?

THE WITNESS: The authors of the Opportunity Meeting was myself and Kenneth Rosenthal. The original one. The amendments that came in were also authored by myself, Kenneth Rosenthal, when he was present, Charles Horowitz, Steven Roth to some extent, not very much and Bruce Katz.

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(Continued on next page.)

THE COURT: Continue, please.

A The other members of the executive board had nothing to do whatsoever the presentations of the scripts as we have defined the term. Your Honor, that definition of management is only pertinent to what we are talking about now; we are discussing the Opportunity Meeting.

THE COURT: I understand that. We are talking about the script for the Opportunity Meeting.

THE WITNESS: That's correct.

THE COURT: Go ahead, Mr. Garmansky.

MR. GARMANSKY: Thank you, your Honor.

Q Mr. Lieberman, were the investors taught anything concerning their attitude at the Opportunity Meetings?

A Yes. They were told in training sessions to be enthusiastic, to applaud the speakers who came up because, after all, we felt that speakers were taking a great burden of doing a lot of work for them by not making them go through the presentation before each one of these individuals. In effect, they were working for them.

They were told to laugh at jodes. Just to generally be enthusiastic.

Q Were the new investors told to look and act successful?

A Yes.

Q Mr. Lieberman, what you were just testifying to concerning the training sessions, were these instructions to new investors given with regularity throughout the existence of Galaxy?

A To the best of my knowledge they were. I was not at every training session, but that was the original plan that was -- that I wrote up and submitted that these instructions be carried through, yes. With certain amendments or deletions or additions, that is.

THE COURT: Let me ask something, Mr. Garmansky, is there a script so called in evidence already?

MR. GARMANSKY: A script concerning what, your HOnor, the training sessions?

THE COURT: Yes.

MR. GARMANSKY: No, I don't believe so.

THE COURT: Or the content of the training session.

MR. GARMANSKY: The script in evidence concerns the Opportunity Meetings and the rules and regulations of Galaxy.

THE COURT: All right. There is nothing in writning, in other words, such as Mr. Lieberman said he and Mr. Rosenthal wrote the script. I thought perhaps you had some draft material or something of

that nature. I remember seeing some original -- it looked like an amended draft document.

MR. GARMANSKY: May I have a second? Something that was marked --

THE COURT: Is that in evidence?

MR. GARMANSKY: Yes, this is on the Opportunity Meetings. This is the prepared script.

THE COURT: That is the prepared script?

MR. GARMANSKY: It is.

THE COURT: Isn't that what we are talking about?

MR. GARMANSKY: We are talking about the training sessions, your Honor.

THE COURT: I understand we are talking about the training sessions, but my point is, would it be correct to say that the content of training sessions is reflected in what is said there, that is what they were told to do and say? No?

MR. GARMANSKY: No. These scripts, your Honor, were the speeches that the speakers gave at Oppottunity Meetings.

THE COURT: But the behavior of those in attendance is what you are talking about?

MR. GARMANSKY: That's correct, what they were instructed to do.

THE COURT: That is not formalized in any kind of instruction sheet?

MR. GARMANSKY: If your Honor will give us one moment.

(Pause)

(Mr. Padilla is now present)

MR. GOIDEL: Your Honor, during the break, may I take a look at those books sitting there, the financial records?

THE COURT: Which are those?

MR. GARMANSKY: If you wish your Honor, I will identify them now. I have brought with me a cash disbursements, cash receipts journal of Galaxy Foods Inc. for the periods of Septenber '71 until August '73. I have also brought in the posting ledger, it is the general ledger with different accounts that were used as the posting book.

THE COURT: May Mr. Goidel have an opportunity during a recess to examine them?

MR. GARMANSKY: Certainly, your Honor. Your Honor does have a Xerox copy, it is six pages concerning the trainins sessions and we will now go over this with the witness concerning this document.

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THE COURT: Well, what I would hope would be, to the extent that there is anything written up which adequately presents what went on, it would save a lot of transcript and a bt of time to put the exhibit in, if it can be properly identified.

MR. GARMANSKY: Thank you, your Honor.

THE COURT: I can read that as well as I can read transcripts.

MR. GARMANSKY: This is in a general outline form, though. There are no speeches as the --

THE COURT: I understand. It may not be adequate but why don't you show it to the witness to see if he can identify it?

MR. GARMANSKY: All right.

THE COURT: Have it marked for identification.

MR. GARMANSKY: I'd like to mark this for identification as plaintiff's exhibit 12.

THE CLERK: Yes. 6-page document marked for identification as plaintiff's exhibit number 12.

(So marked.)

DIRECT EXAMINATION

BY MR. GARMANSKY: (Cont.)

Q Mr. Lieberman, do you recognize what has been marked as plaintiff's exhibit 12?

A Yes, I recognize it.

Q Did you prepare plaintiff's exhibit 12?

A No, I did not.

Q Did you prepare any part of plaintiff's exhibit 12?

A Yes, I did.

Q Please tell us what parts of plaintiff's exhibit 12 you prepared?

A I prepared pages 1 and 2.

Q Are you familiar with --

A I did not prepare page 3. I did not prepare page 4. I did not prepare page 5. I did not prepare page 6.

Q In other words, Mr. Lieberman, you only prepared pages 1 and 2?

A That's correct.

THE COURT: It is a 6-page outline?

MR. GARMANSKY: It is a 6-page outline, your Honor.

Q Mr. Lieberman, have you seen pages -- have you ever seen pages 2 to 6 prior to today?

A Yes, I did.

Q When for the first time?

A A few days ago, during a pretrial examination, in the offices of the Securities and Exchange Commission.

Q Mr. Lieberman, did anyone else, to your knowledge, write any training manuals in Galaxy, other than yourself?

MR. GOIDEL: Excuse me for interrupting. Your Honor, Mr. Lieberman has just made mention of the fact that there was a pretrial examination a few days ago.

THE COURT: Perhaps he means an interview. Does he?

MR. GARMANSKY: That's what this meant, your Honor.

THE COURT: He means an interview.

MR. GOIDEL: Were minutes taken of that?

MR. LERNER: Is this voir dire?

MR. GARMANSKY: What does Mr. Goidel want, your Honor?

MR. GOIDEL: It is my understanding that in any pretrial proceedings of any type minutes are to be taken of the witnesses to be questioned, that all parties are to be notified.

MR. GARMANSKY: It was not a deposition, your Honor.

MR. GOIDEL: It was not a deposition?

MR. GARMANSKY: No.

THE COURT: I said, although it was referred to I think as a pretrial meeting or something of that nature, it was an interview in preparation for his testimony here, I take it.

MR. GOIDEL: If minutes, your Honor, were taken, I'm placing the Securities and Exchange Commission on notice that for my cross-examination I may want those minutes produced.

THE COURT: Well, that raises the basic question about the privilege of a lawyer's work product. Doesn't it?

MR. GOIDE: He is a party. He is an adversary, in any proceeding involving them, and it goes to the question of credibility, preparedness for testimony and so forth.

I have the right to use any document prepared in the course of litigation by any adversary.

MR. GARMANSKY: Your Honor, that is totally not true.

MR. GOIDEL: To develop the cross-examination of another party defendant.

THE COURT: Well now, you are not getting this mixed up with a criminal case, are you?

MR. GOIDEL: No sir, I am not.

He acknowledges that he made a statement somewhere and that statement is available in Court or available to a party, then I have the right to see it for the purposes of cross-examination.

THE COURT: Well, I would go along with you, if he made a statement. If he made a statement that was taken down, then I would request the Commission to produce it for you to examine it, or if he made notes of his own, you might inquire on cross-examination as to that.

But if it was simply in the nature of a conference, to go over what he might be expected to testify to, which was not recorded, you are out of luck.

MR. GOIDEL: Naturally. If it wasn't recorded, I appreciate that I am out of luck, that I have to ask him to refresh his memory.

THE WITNESS: Your Honor --

THE COURT: You remain silent. You do not take part in this discussion. This is a colloquy between the Court and counsel.

Let me ask the Commission counsel. Was a transcript made of this?

MR. LERNER: Your Honor, no transcript was made

of that discussion. There was no Court Reporter there.

THE COURT: Nothing --

MR. LERNER: I am not sure that --

THE COURT: Let me put it this way. Nothing was written down and shown to the witness which he might have signed and saying it was a correct exposition?

MR. LERNER: That's correct, your Honor.

THE COURT: Nothing of that sort?

MR. LERNER: That's correct.

MR. GOIDEL: How about a tape?

MR. LERNER: There were no tapes made.

THE COURT: No tapes.

MR. LERNER: I am not sure if Mr. Goidel is interested in Jencks Act material but we aren't involved in --

MR. GOIDEL: Sorry?

MR. LERNER: If you are interested in Jencks Act material, we're in the wrong -- involved in the wrong type of case, I am afraid.

THE COURT: Let me put it this way. Mr. Jencks -- I mean, Mr. Goidel may be thinking of the Jencks Act. I don't know.

I would say he is probably on firmer ground

that since this witness was a defendant in the case and is one of those, I take it, who has entered into a consent decree, if he gave a statement in writing, whether he wrote it or someone else wrote it and he signed it, I think it would be producible for the purposes of cross-examination.

But on your representation that nothing like that exists and that there was no recording of his statements, as I say, you are out of luck, Mr. Goidel.

MR. LERNER: We'd be willing to allow Mr. Goidel to voir dire the witness right now, your Honor, with respect to that.

THE COURT: I do not think we ought to.

MR. GOIDEL: I'll take your word if you tell me there was no record made.

THE COURT: I do not think we should prolong matters that way. I am trying to shorten them.

Actually then what we have heard so far is that he prepared pages 1 and 2 but that his viewing of the balance of that exhibit 12 for identification was only a few days ago.

MR. GARMANSKY: That's correct, your Honor.

THE COURT: Not something that occurred during

the course of the operations of Galaxy.

MR. CARMANSKY: Your Honor, at this time I'd like to offer into evidence pages 1 and 2 only of plaintiff's exhibit 12.

THE COURT: All right.

MR. GOIDEL: I have no objection to pages 1 and 2, your Honor.

MR. GARMANSKY: Would you put a clip on those two?

THE CLERK: Yes. You have 1 and 2? Just the first two pages?

MR. GARMANSKY: Just the first two pages.

THE COURT: Now let's see. It might be a good idea to mark the balance plaintiff's exhibit 12-A for identification.

MR. GARMANSKY: Fine.

THE COURT: So that it will remain connected to the rest of the document. We do not know what its future fate might be.

You can keep it separate and apart but it will be related to 12.

THE CLERK: Two pages are marked plaintiff's exhibit number 12 in evidence.

(So marked.)

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THE CLERK: The other four pages are marked for identification as plaintiff's exhibit 12-A.

(So marked.)

MR. GARMANSKY: Thank you.

BY MR. GARMANSKY:

Q Mr. Lieberman, have you ever heard the term GTC before?

A Yes, I have.

Q Would you please explain what that term is?

A It's an abbreviation for the words get the check.

Q Was that phrase, get the check, taught at training sessions?

A Was the phrase taught? The subject was taught, yes.

Q What was discussed or what was taught at the training sessions concerning get the check?

A Well, we discussed the many varied ways to assist up an interested prospective distributor in getting the necessary capital to come in to Galaxy Foods. Some of those methods were finding out if the individual had insurance that might be redeemable at some cash value; bank loans; finding out if he had any money that he could borrow against on a savings bank loan; and in general assisting him in any

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way that you could or making suggestions of ways that he could get the money to come into Galaxy Foods.

We also during that time made comparisons of what would happen if an individual, for instance, took $5,000 and put it in a bank at 6 percent interest or if he invested it in stock, which -- at the market value. I believe we used 12 percent increase, and if he performed a minimal amount of work in Galaxy Foods, what the results would be and compared them.

Q Mr. Lieberman, what you've just testified to, is that present in plaintiff's exhibit 11 for identification?

A Part of it is. We don't have the -- the portion about a bank -- I don't see the thing about -- oh, yes. It's here twice, as a matter of fact. Once on what would be page 6 and once on what might be page 8.

Q Mr. Lieberman, did the investors receive plaintiff's exhibit 11?

A If they wanted it, yes. It wasn't --

Q They had --

A They had to buy it.

Q How much was it?

A I don't remember.

THE COURT: They were sold to them, you mean.

THE WITNESS: That's correct.

Q Who prepared plaintiff's exhibit 11?

A Bruce Katz and Steven Roth.

Q Was plaintiff's exhibit 11 discussed at the executive board, at any executive board meeting?

A The idea of preparing what we called a closing book or what on the face of it is a distributor's guide was discussed, yes. The contents were not.

Q Okay. At that meeting, at that executive board meeting where plaintiff's exhibit 11 was discussed, was defendant Kirsch present?

A Yes.

MR. GOIDEL: May I hear the last question, please.

THE COURT: Read it back, the question and answer.

(Record read.)

MR. GOIDEL: Your Honor, plaintiff's exhibit -- I move to strike the question as presuming facts not in evidence.

To the contrary, the witness has already testified that plaintiff's exhibit 11 was not discussed. Only the logo that appeared on the cover was discussed.

THE COURT: By the way, I meant to ask, what is

plaintiff's exhibit 11? Is that in evidence?

MR. GARMANSKY: No. It's just marked for identification. I'll move it.

THE COURT: What is it.

MR. GARMANSKY: It's a Galaxy Foods, Inc. marketing concept. It has the structure of Galaxy, the organization chart. It has the -- some earnings a person or an investor could earn in Galaxy, the marketing structure.

THE COURT: I see. Well again, Mr. Kirsch, any inconsistency --

MR. GOIDEL: Mr. Goidel, your Honor.

THE COURT: I mean, Mr. Goidel, any inconsistency in answers, if I see a matter for exploration on --

MR. GOIDEL: No. It is the question that I am objecting to and I move to strike it because it is the question that presumed the facts. The witness just -- the question before said that plaintiff's exhibit 11 was not discussed, only the logo was discussed, and Mr. Garmansky came forth with the next question which incorporated plaintiff's exhibit 11 as an entire entity as having been discussed before the board or the executive board, whatever it was called.

MR. GARMANSKY: Your Honor, I believe Mr. Goidel

is mistaken. If we could have the record read back on that relevant portion?

THE COURT: All right. I will tell you, while the reporter is looking for it, I will take a short criminal matter.

(Recess taken.)

(Continued on next page.)

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THE COURT: All right. Read that back, please.

(Record read.)

THE COURT: The contents were not.

MR. GARMANSKY: I withdraw the question.

MR. GOIDEL: It is the next question.

THE COURT: All right. The question is withdrawn. This past question.

The question and answer are stricken, for the record.

BY MR. GRAMANSKY:

Q Mr. Lieberman, at the time of the executive board meeting concerning the preparation of a closing book, Plaintiff's Exhibit 11 was not in existence, is that correct?

A That's correct.

Q Now, what was discussed concerning a closing book?

A Well, we discussed whether or not to have one. We knew it was going to take a little bit of money to produce one. We wanted to know if everybody thought it would be a good idea, to use as a -- again, a tool for the franchise salesmen, that being the field managers and distributors.

Can I take a look at that book? I believe I made a mistake on something.

I'm sorry, yes, I did.

You asked me who prepared this book and I testified to Mr. Katz, Mr. Roth, Mr. Horowitz, myself. I'd like to add a few names.

Mr. Marinaccio definitely.

Q Marinaccio, who was Art Advertising?

THE COURT: What is it? His last name?

THE WITNESS: Marinaccio, M-a-r-i-n-a-c-c-i-o.

THE COURT: He was what? Vice president?

THE WITNESS: He was first a vice president of Art Advertising and then later the executive vice president of Art Advertising.

I also have to add Mr. Kirsch's name. He prepared a portion of the book called Supermarket Analysis. That was done from the research he had been conducting.

MR. GRAMANSKY: Your Honor, Plaintiff would like to offer into evidence Plaintiff's Exhibit 11.

MR. GOIDEL: I'd like to conduct a voir dire first, your Honor.

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. GOIDEL:

Q This yellow page I believe is what you say was prepared by Mr. Kirsch?

A This one.

Q This yellow page?

A Right.

Q I see. Called Supermarket Analysis?

A That's correct.

Q And how about the other yellow page?

A I think -- I think all those three yellow pages were the ones, all incorporated into this, the Supermarket Analysis. I am not sure that that book is in the right order right now, Mr. Goidel.

In other words, it should be --

Q Let me ask you this. This book in this fashion containing these pages is the book that was sold?

A That's correct.

Q Or is this in anyway modified from the type of book that was in fact sold?

A All right. There are certain things in it that were -- were changed as we went along. New pages were printed up.

Q The form in which it exists at this moment is for what period of time?

A I can't answer that; Mr. Goidel. I don't know.

MR. GOIDEL: Then I object your Honor, to its

introduction in evidence.

THE COURT: I will overrule the objection, subject to your right, of course, to cross-examine.

MR. GOIDEL: Ye sir. Certainly I didn't want to go into that here.

THE COURT: No.

THE CLERK: All right. Plaintiff's Exhibit 11 now marked in evidence.

(So marked.)

THE CLERK: Does your Honor want to look at it?

THE COURT: I will take a quick look.

BY MR. GARMANSKY:

Q Mr. Lieberman, you recognize Plaintiff's Exhibit 7 in evidence?

A Yes, I do.

Q Do you know who prepared Plaintiff's Exhibit 7 in evidence?

A I think it was almost entirely prepared by Mr. Katz. I don't remember anybody else preparing this.

Q Was Plaintiff's Exhibit 7 in the form you are looking at it now given to the executive board for their approval?

A No.

Q Did the executive board have any discussions

concerning Plaintiff's Exhibit 7?

A Yes.

Q Was Mr. Kirsch present at those discussions?

A Yes.

Q Please tell us what was discussed concerning Plaintiff's Exhibit 7?

A The first question you asked me was was it presented in the from it is now. It was presented hand-written out or typed out, I am not sure, but prior to it going into -- into the newspaper --

Q Mr. Lieberman, just to interrupt you, will you please give us the time period the discussion took place?

A This was -- the only way I could tell that -- I believe the discussion took place the second week in July.

Q Is that your best recollection, Mr. Lieberman?

A Yes, it is.

Q Now please continue with your previous answer. What was discussed concerning Plaintiff's Exhibit 7?

A Well, Plaintiff's Exhibit 7 came about because of a new rule and regulation that the executive board was putting -- proposing -- was proposed at an executive board meeting.

This rule and regulation said that a guaranteed -- guaranteed that the people who were in the business could

receive a certain portion of their investment back by June 30, 1973, should the -- the company not fulfill a certain quota of work at that time.

So we felt that in that way it was almost a money-back guarantee, if we didn't perform that particular amount of work, that therefore it would be guaranteed, and it was Bruce Katz' idea, which he proposed to the entire executive board, to put this rule and regulation into effect and at the same time start a campaign porposing that we had a guaranteed investment.

It was guaranteed in the manner that I spoke about and that was made clear to everybody and that was proposed at the executive board meeting, that everything be made clear.

Q Mr. Lieberman, I'd like to show you Plaintiff's Exhibit 3 in evidence. Is that rule or regulation you've just testified to in Plaintiff's Exhibit 3?

A Yes, it is.

Q What is the number of that rule?

A 21.

THE COURT: That is Plaintiff's Exhibit 3?

MR. GARMANSKY: Plaintiff's Exhibit 3, your Honor.

THE WITNESS: It appears on page 9 of the

second portion of it.

THE COURT: That's in evidence?

MR. GARMANSKY: Yes, it is.

THE COURT: Page 9.

THE WITNESS: Of part 2 of the manual.

Q Mr. Lieberman, would you please read Rule 21 out loud?

A "Galaxy shall do all in its power to commence retail operations. Should the operating retail territory (consisting of from 8,000 to 12,000 customers) not have begun operations by June 30, 1973, Galaxy agrees to, a) if feasible, continue in the effort to establish the first retail operation; b) give the option to those individuals who wish to sell their distributorships back to Galaxy in an amount equal to the original purchase price, less commissions paid against it, less 10 per cent for handling costs and interim operating expenses. Those individuals wishing to sell must notify the company in writing after the above mentioned date.

"The company shall complete the repurchase within sixty (60) days after receiving such notification."

Q Mr. Lieberman, Plaintiff's exhibit states a

2,000 or 5,000 guaranteed investment; is that correct?

A That's correct.

Q Now, the $2,000 was for the field manager franchise?

A Correct.

Q And the $5,000 was for the distributor?

A That correct.

Q Mr. Lieberman, if a person invested $5,000 and used -- used the Rule 21, how much money could he get back under that tule?

A Well, 40 per cent commissions were paid out, so -- and 10 per cent interim operating expenses.

That's a total of 50 per cent. He could get back 50 per cent of $5,000 or $2500.

Q Does Plaintiff's Exhibit 7 state that a person can only get back 50 per cent of his investment?

MR. GOIDEL: Objection. The document will speak for itself.

THE COURT: I will allow it.

A No, but that was explained to them.

Q Thank you, Mr. Lieberman.

MR. PADILLA: That thing, does that say less commissions earned or commission paid out against?

MR. GORMANSKY: I am sorry?

MR. PADILLA: On that guarantee, the way it reads again, could you read it back over again, please? Does it read commissions earned or commisions --

MR. GARMANSKY: Here is the exhibit which was read.

MR. PADILLA: Paid against. All right, I thought -- I wasn't sure whether it said commissions earned by the individual distributor or commissions paid against it.

BY MR. GARMANSKY:

Q Q Mr. Lieberman, you testified that you knew Mr. Shevack since your association with Koskot; is that correct?

A That's correct.

Q Did Mr. Shevack invest any money in Galaxy?

A Yes, he did.

Q How much did he invest, do you know?

A $5,000.

Q Do you know the circumstances under which Mr. Shevack invested this money?

A Yes, I do.

Q Will you please tell the Court those circumstances?

A Well, I met Mr. Shevack at an opportunity

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meeting in a hall in Brookly. Mr. Shevack had not come to the meeting. He had come to the hall to rent the hall.

And I asked him if he'd like to come in and see the business of Galaxy, and he said yes and he came in.

After the meeting we went to a restaurant, to have a cup of coffee and we discussed the possibility of him coming to Galaxy Foods.

He said he did not have the necessary capital to come in as a distributor. Being a success oriented individual, he did not want to come in as a field manager. He wanted to come in at the highest position he could get in at.

I told him that I would allow him to work his way into the business through my own distributorship. In other words, he would sponsor people to the meeting under my distributorship. Any of those people who entered the business, would hold the commissions until the total amount of $5,000 was reached and at which time I would turn the commissions over to him and he would put it back into the business and come in as a distributor.

Therefore, I was his sponsor when he came into the business. He did that. I don't remember the exact date that he entered the business, but I believe it was in the summer of '72, something in that neighborhood.

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He had sponsored, I believe, four individuals into the business, on his own, that were registered to me.

He entered the business, took $5,000 -- I gave him the $5,000. He put it right back into the company. I was paid the commission for the sale of his franchise and the people that he had sponsored in under my distributorship were then transferred to his distributorship, with their permission.

Q Thank you. Mr. Lieberman, what you just testified to, is this the usual procedure for obtaining a franchise in Galaxy?

A No, it was not the usual procedure.

Q Was there any reason, Mr. Lieberman, you can tell us why Mr. Shevack received this special treatment?

A Yes. Definitely. He is to this day, as far as I know, an extraordinarily good franchise salesman, or just salesman, period.

I felt that he would be an asset to Galaxy Foods and I would be proud to be his sponsor.

Q You mean you felt he could recruit many people into Galaxy?

A I felt he could perform all the functions of a distributor of Galaxy.

Q Mr. Lieberman, did Mr. Shevack sponsor anyone into Galaxy on his own initiative and in his own organization as a distributor?

A Yes, he did.

Q Do you know how many people?

A No, I do not.

Q Do you know of any problems that arose with anyone that Mr. Shevack attempted to sponsor into Galaxy?

MR. GOIDEL: Note my objection, your Honor.

MR. GARMANSKY: Grounds, Mr. Goidel?

MR. GOIDEL: No. 1, it is improperly framed and, No, 2, it calls for hearsay the way you phrased it.

THE COURT: All right. Why don't you try to reframe the question so as to obviate the objections?

Does this witness know --

MR. GARMANSKY: I believe that's what I asked. May I have the question read back?

(Question read.)

THE COURT: I think the objection, while anticipatory, does point to a possible problem here.

As I say, I would much prefer to limit the hearsay as much as possible.

MR. GARMANSKY: I will rephrase it, your Honor.

Q Mr. Lieberman, do you know a Melvin McLean?

A Yes, I do.

Q Who is Melvin McLean?

A He was a Field Manager in Galaxy Foods.

Q Who sponsored Mr. McLean into Galaxy?

A Arthur Shevack.

THE COURT: Was he a distributor?

THE WITNESS: A Field Manager.

Q Mr. Lieberman, did any problems arise concerning the sponsorship by Mr. Shevack of Mr. McLean into Galaxy?

MR. GOIDEL: Objection. I don't understand.

Can you ask him if he said anything, did anything. "Any problems?" That calls for an operation of this witness' mind.

THE COURT: That's true, in its present form it certainly does.

MR. GARMANSKY: Your Honor, I will rephrase the question again.

Q Mr. Lieberman, were any problems brought to your attention concerning Mr. McLean and Mr. Shevack?

THE COURT: You can answer that yes or no.

THE WITNESS: Yes, your Honor.

THE COURT: What's the answer?

THE WITNESS: The answer is yes.

THE COURT: All right. In what manner were these brought to your attention?

THE WITNESS: Mr. McLean came forward and told me of a situation that existed, and --

THE COURT: Just a minute. Is McLean going to be available as a witness?

MR. GARMANSKY: Yes, he will, your Honor.

THE COURT: Is this testimony really going to be relevant?

MR. GARMANSKY: Your Honor, I think I can obviate some of this. Mr. Lieberman ..

discussed a

situation with Mr. Shevack.

THE COURT: I see.

MR. GARMANSKY: So we can have an offer of proof here, if you wish.

THE COURT: Is Mr. Shevack going to be -- he is your client, that's right. I will permit this witness to testify to a discussion with Shevack about this matter.

MR. GARMANSKY: Then the witness is instructed not to testify as to McLean?

THE COURT: I think it would be preferable to have the conversation between this witness and Shevack disclosed.

I take it this was during the period of the Galaxy operation, no question about that?

MR. GARMANSKY: It was.

THE COURT: Perhaps the witness has some time period in mind.

THE WITNESS: Your Honor, I have the exact date.

THE COURT: All right.

Q What is that date, Mr. Lieberman?

A That was --

Q (Continuing) -- that you had a discussion with Mr. Shevack concerning Melvin McLean.

A September 29, 1972.

Q Why does that date stick in your mind, Mr. Lieberman?

A Because there was a price change in the price of franchises coming up in October 1st and Mr. McLean wanted to get into the business before the price change. I remember it occurred --

Q Mr. Lieberman, would you please tell the Court of your discussion with Mr. Shevack, what you said to him and what he said to you?

A We explained to Mr. Shevack the situation that Mr. McLean -- see, I don't know how to answer this, Mr. Garmansky, because if I can't say what Mr. McLean told me, how can I set the stage for what we discussed with Mr. Shevack?

THE COURT: Are you saying in effect that you had previously discussed this matter with Mr. McLean?

THE WITNESS: Yes. He had presented the situation to us. Then we went to Mr. Shevack to either have him confirm or deny and try to make some sort of settlement with the situation.

THE COURT: In view of my clearer understanding, and in view of Mr. Garmansky's representation that Mr. McLean will be a witness here and available for cross-examination, I will permit Mr. Lieberman then to

state what discussion he had with Mr. McLean first.

MR. GARMANSKY: Thank you, your Honor.

A Mr. McLean came forward to not only myself but my wife, Mr. Katz, Mr. Horowitz and Mr. Avni and told us that it was represented to him by Mr. Shevack that if he gave a deposit to Mr. Shevack he would be allowed to work the business, very much in the manner that Mr. Shevack had worked for me.

Q Who is "he"? You said if he gave a deposit --

A If Mr. McLean gave a deposit to Mr. Shevack, that he would be allowed to work through Mr. Shevack's distributorship and work his way in. However -- from what he represented to me, he did give a deposit and he had brought, I believe he said, three people into the business and, again, Mr. Shevack was supposed to be holding the money as I had held it until the amount of $2,000 was gathered and then Mr. McLean would be put into the business, as I had done with Mr. Shevack.

Q Mr. Lieberman, did Mr. McLean tell you that he gave a deposit to Shevack for the purchase of a Field Manager position?

A Yes, he did.

Q Do you recall the amount of money?

A No, I do not.

Q What is your best recollection as to the amount of money?

MR. GOIDEL: Objection. He just testified he wasn't told.

THE COURT: Did you testify you weren't told?

THE WITNESS: I was told.

THE COURT: But you have no recollection.

THE WITNESS: But I don't remember what the figure was. It's two years ago, your Honor. I don't remember what it was.

Q Mr. Lieberman, did you yourself go to the books and records of Galaxy to see whether or not any monies had been paid on deposit for Melvin McLean?

A Yes, I did.

Q What did you find, Mr. Lieberman?

A That no money had been deposited with Galaxy.

Q For Melvin McLean?

A For Melvin McLean.

Q For the purchase of a field manager position?

A That's correct.

Q Did Mr. McLean tell you the names of the people he brought into Galaxy?

A Yes, he did, at that time.

Q Do you know who received the commissions for those people, Mr. Lieberman?

A Mr. Shevack.

Q How do you know this?

A I had signed the checks for the commissions.

Q That went to Mr. Shevack.

A Yes.

Q What else did Mr. McLean tell you?

A Well, he said that the original agreement that had worked out had either been misunderstood or misinterpreted by him or by Mr. Shevack; there was nothing on paper. He said Mr. Shevack told him that after everyone he brought in he would receive a lesser commission on the next one, or something of that nature.

But it just had not worked out and he was not in the business and he was worried because the price change was coming about and unless something was done quickly he felt he would have to pay another thousand dollars to get into the business.

Q Did Mr. McLean have a contract stating he was a field manager?

A I don't know that, whether or not he had a contract. He had none that was approved by Galaxy Foods.

MR. GOIDEL: I have a standing objection to this entire line of questions, may I understand that?

THE COURT: All right. Because the price was going up to $2,000?

THE WITNESS: It was going up to $3,000, your

Honor. It was already two.

BY MR. GARMANSKY:

Q Mr. Lieberman, concerning this gradual decrease of commissions that Mr. McLean said he could earn with Mr. Shevack, would you please tell the Court what that was about?

A Well, I never really -- to the best of my knowledge, I never really found out the whole story because the situation was settled pretty quickly. I never found out who said what or what the actual agreement was. I don't think it was clear to either party what the actual agreement was.

Q Thank you, Mr. Lieberman.

MR. GOIDEL: He is in the middle of an answer when Mr. Garmansky cut him short.

MR. GARMANSKY: I would like to strike the witness' answer as unresponsive to the question. I have asked him what was the commission structure between Mr. McLean and Mr. Shevack.

THE COURT: He said he really didn't know.

MR. GARMANSKY: Then I would like to strike everything after his first response.

MR. GOIDEL: Your Honor, I certainly have no objection to what Mr. Garmansky said. All I ask is that in the future, before the motion to strike is made,

let the witness finish speaking.

THE COURT: All right. We will try to regulate matters that way. I think for present purposes, however it is clear that the witness really didn't know. There is no use in having his speculation. If there is something specific which followed which he does know, let's explore that.

Q Mr. Lieberman, what did you do after your discussion with Mr. McLean?

A Well, naturally -- I say we, the people who had had the discussion notified Mr. McLean -- were notified by Mr. McLean, called Mr. Shevack and Mr. Cancilla --

THE COURT: Wait a minute. You are kind of vague there. Did you go see Shevack or talk to Shevack?

THE WITNESS: We spoke to --

THE COURT: Who is "we"?

THE WITNESS: I don't know which one actually made the contact with Mr. Shevack.

THE COURT: Wait a minute. What you are really saying is that you didn't go to Shevack about this.

THE WITNESS. Oh, no. I'm saying that I don't know who called him, but he came into our office.

THE COURT: All right. Shevack was eventually confronted by you.

THE WITNESS: That's correct, your Honor.

THE COURT: Is that true?

THE WITNESS: That is correct.

THE COURT: All right. Let's start there.

THE WITNESS: Mr. Shevack was called into our office in the warehouse. Mr. Katz presided over the interview, but I was present during the entire time.

Q Who else was present, Mr. Lieberman?

A Mr. Avni and myself, Mr. Katz and Mr. Roth. I don't believe anybody else was present.

Q Was this almost immediately after your discussion with Mr. McLean?

A I would say the next day.

Q Thank you. Now, Mr. Lieberman, tell us what was discussed at this meeting with Mr. Shevack.

A The meeting --

THE COURT: Who said what to whom, to the best of your recollection?

THE WITNESS: Mr. Katz, as I said, presided over the meeting. He did most of the talking. Mr. Cancilla was also present. Mr. Katz said --

MR. GOIDEL: I am going to object to this now.

THE COURT: What about Katz, is he going to be a witness here?

MR. GARMANSKY: Your Honor, the Commission does not know as of this time whether or not Mr. Katz will be a witness.

Your Honor, it is a statement that was said in front of the defendant, in the witness' presence. I think it is admissible for that reason, it's not hearsay.

MR. GOIDEL: It is an extrajudicial statement.

THE COURT: I agree that to the extent that this witness is relating what Katz said to Shevack, Shevack --

MR. GOIDEL: Based upon what some third person had to say to him and Katz.

THE COURT: Oh, no, that is not the purport of this witness. This witness was there along with others. He has said that Katz did most of the talking. I take it that what he is going to talk about is what Katz said to Shevack.

Now, Shevack is a defendant in the case, he will have the opportunity -- you will have the opportunity not only to cross-examine this witness, you will have the opportunity -- Shevack will have an

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opportunity to give his version of it here, and if Katz is not going to be called as a witness, maybe you can subpoena him.

MR. GOIDEL: Your Honor, first of all, it is the --

THE COURT: Isn't he as equally available to you as he is to the SEC?

MR. GOIDEL: Absolutely not. He just made an arrangement with the SEC, supposedly --

THE COURT: That only means that you can treat him as a hostile witness.

MR. GOIDEL: Your Honor, as I understood it, perhaps I read something into that, and to that end I will accept the blame, your Honor said that they would be maintained as defendants in the action and I was, for whatever reason I was, under the belief that those gentlemen would be sitting here in the courtroom. For whatever reason they are not. All right. That is my error.

Since Mr. Katz is a party defendant he can be produced to testify as to what he said -- and we don't need a third person to interpret what he said. He is a party. He is available to tell the story here in court.

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The fact that they may not want to put him on the stand for another reason, they still see fit to have somebody testify as to what Mr. Kat said on one occasion. Put him on the stand and limit his testimony to the one conversation.

(continued next page)

MR. GARMANSKY: Your Honor, I would like to clarify the record.

Mr. Goidel said the SEC had an arrangement with Mr. Katz. The SEC has reached settlement negotiations with Mr. Katz. There is no arrangement, as Mr. Goidel stated.

Furthermore, the witness was in the hearing and presence of Mr. Katz. He's not interpreting what Mr. Katz said. He's going to state --

MR. GOIDEL: I am advised that Mr. Katz is in Florida. Would you like me to subpoena him?

MR. GARMANSKY: Let me finish, Mr. Goidel.

He's going to testify as to what Mr. Katz stated to Mr. Shevack and what Mr. Shevack stated in response. That is within the witness's own personal knowledge. He's testifying firsthand, not thirdhand, not second-hand, within his own personal knowledge, your Honor.

THE COURT: That isn't all together the case, because the problem with it is, Katz, who is the actor, in a sense, is unavailable, apparently, or supposedly unavailable, for cross-examination.

How does Mr. Goidel -- it leaves Mr. Goidel, first of all, with perhaps a client who can be placed on the stand and who will quite possibly deny or take

issue with certain things, I don't know, and then the Court is left with determining the matter on the basis not of so much the truth of what was said but the respective crdibility of Shevack versus Lieberman, who was not the actor, and has become the actor only because he's the convenient man in Court to repeat this.

I think there is merit to the objection, that this is hearsay of what someone -- to the extent that it reports as evidence in the case what someone said to someone else. It isn't as thought it is being offered for state of mind or one of these classic exceptions to the hearsay rule. This is being offered, I take it, as direct evidence of fact.

I have the distinct impression that it was this witness who was an actor in the McLean-Shevack controversy, whatever the relevance of that is to this situation.

If this witness is personally able to testify that he knows or -- because it is essentially conversations we are dealing with here, and the Court is going to be asked to draw inferences from those conversations.

I don't know what the availability of Katz is.

Is he likely to come up here for this case or not?

MR. GARMANSKY: Your Honor, I don't know that but --

MR. GOIDEL: Your Honor, I am advised that Mr. Katz is presently in the State of Florida some place.

THE COURT: Yes, but my believe is, I'm not sure about this now, I'll have to ask our experts here -- I think in these Securities matters a subpoena may reach him anywhere.

MR. GOIDEL: We don't have an address for him.

THE COURT: Perhaps the Commission can ascertain that.

MR. GOIDEL: They might.

MR. GARMANSKY: Your Honor, the Commission will withdraw the last question.

BY MR. GARMANSKY:

Q Mr. Lieberman, at this meeting, did Mr. Katz make statements to Mr. Shevack?

A Yes.

Q Did Mr. Shevack respond to Mr. Katz?

A Yes.

Q What did Mr. Shevack say?

A Mr. Shevack said that he did have an agreement

with Mr. McLean and that apparently there was a misunderstanding about the agreement and that he would do what Mr. Katz had told him to do to rectify the situation.

Q Did Mr. Shevack explain how he was going to rectify the situation?

A Yes. He had agreed to do what Mr. Katz had more or less strongly suggested. He said that he would place the amount of money necessary for Mr. McLean to come into the business, less the commissions that he would normally receive anyway.

In other words, on a $2,000 field manager position, we paid $750, I believe, in commissions. He would therefore place into Galaxy $1,250 for Mr. McLean, putting him in the business as a field manager.

Q Did Mr. Shevack subsequently put in $1,250 for Mr. McLean?

A Yes, he did.

Q Mr. Lieberman, when Mr. Shevack invested in Galaxy, was he required to attend the training sessions?

A Yes, he was.

Q To the best of your knowledge, do you know whether or not Mr. Shevack attended the training sessions?

A I do not know.

Q Mr. Lieberman, do you know Mr. George Padilla?

A Yes.

Q Is Mr. Padilla here in the Court today?

A Yes, he is.

Q When did Mr. Padilla join Galaxy?

A I don't know.

Q Could you give us the year, Mr. Lieberman?

A I believe it is 1972.

Q Did Mr. Padilla speak at Opportunity Meetings?

A Yes, he did.

Q Did you hear him speak at Opportunity Meetings?

A Yes, I did.

Q Can you tell us approximately how many Opportunity Meetings Mr. Padilla spoke at?

A I wouldn't want to try to estimate that, Mr. Garmansky. I could be off by 50 per cent.

Q Was it more than 25?

A Again, I'd rather try to stay away from a figure if I possibly can.

Q Did Mr. Padilla speak at training sessions conducted by Galaxy?

A I believe he did, yes.

MR. PADILLA: I object to that. Either the witness knows or -- what's this "I believe." Either he knows or he doesn't know.

THE COURT: That sounds like a pretty good objection, so I will sustain the objection unless the witness is prepared to say he knows he did.

Can you state that?

THE WITNESS: I didn't hear him speak at any training session I can remember.

However, it was my information that he did --

THE COURT: That information is again quite ambiguous. I think we better stick to what you know here.

I will strike out the answer with respect to attendance at training sessions.

(Continued on next page.)

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DIRECT EXAMINATION

BY MR. GARMANSKY: (Cont.)

Q Mr. Lieberman, do you know whether or not any Spanish training sessions were held?

A Yes, they were.

Q Who initiated the training sessions for Spanish-speaking investors in Galaxy?

A Galaxy Foods management.

Q Do you know if any were appointed instructors at these Spanish-speaking sessions?

A Yes, I do.

Q Who was appointed instructor?

A Edgar Mendez, Joe Vega and I believe Rafiel -- I don't remember his name.

Q Did Mr. Padilla hold any positions in Galaxy other than an investor?

A Oh, yes, he was director of wholesale

Q What did that position -- what were the functions of that position, Mr. Lieberman?

MR. PADILLA: I object, your Honor. It says I held a position. I'd like to know what time, from what period of time to what period of time I held a position, if any.

THE COURT: I will sustain your objection.

Why don't you ask Mr. --

Q What periods of time did Mr. Padilla hold this position in Galaxy?

A I don't remember.

Q Do you recall the year, Mr. Lieberman?

A 1972.

Q Late 1972, early --

THE COURT: Did you say late 1972?

THE WITNESS: I said 1972.

MR. GARMANSKY: I'm trying to exhaust the witness' recollection, your Honor.

Q Was it late 1972?

A I think it was closer to the summer of 1972. Wait --

Q Thank you, Mr. Lieberman.

MR. PADILLA: Again I object, your Honor. Either you know or you don't know.

THE WITNESS: Mr. Padilla was appointed to the position, as he carefully reminded me the other day, at the awards banquet which was held in September of 1972, so he imagines he held the position September and perhaps October of 1972.

Q Now, Mr. Lieberman, what were the functions and duties of this position, director of wholesale?

A He supervised the opportunity presentations, he reported directly to the executive vice president in charge of field operations and in general gave aid and assistance to distributors at Opportunity Meetings.

Q What type of aid and assistance did he give?

A He helped with the guests, he reminded them about the things they learned in training as far as dress --

MR. PADILLA: I object to that.

Did he see me doing these things?

MR. GARMANSKY: Your Honor, Mr. Padilla has a right of cross-examination, and if he wi-hes to bring these points out then --

THE COURT: Yes, you will have a right of cross-examination.

I do think the witness should confine himself to personal observations.

THE WITNESS: I thought the question was what were his functions.

MR. GARMANSKY: That was the question, your Honor.

THE WITNESS: What was his job, you asked.

MR. PADILLA: Read back the question, it's what did I do was the question.

THE COURT: That's what I thought the question was.

MR. GARMANSKY: Read the previous question.

(Record read.)

THE WITNESS: May I answer that question?

THE COURT: You've already answered that he supervised Opportunity presentations, reported to the executive vice president in charge of field operations.

But Mr. Padilla started to object when you started to describe things he did personally and I think that's where the rub is. Unless you personally observed him doing things --

THE WITNESS: I did, your Honor.

THE COURT: If you did then you are free to testify what you personally observed.

THE WITNESS: I personally observed him assisting distributors with their guests, reminding them about the fact that they should sit with their guests, sort of clocking the meeting as far as time was concerned and after the meeting was over, greeting the guests, introducing himself and helping them close the guest into the business.

THE COURT: We will take a break for ten minutes.

GR flws24 (Recess taken.)

THE COURT: All right, you may proceed.

DIRECT EXAMINATION

BY MR. GARMANSKY (Cont'd):

Q Mr. Lieberman, do you know Irwin Donald Kirschenblatt, also known as Donald Kirsch?

A Yes.

Q Is he present in the Courtroom today?

A Yes, he is.

Q Now, could you please explain how Mr. Kirsch joined Galaxy?

A I believe he was -- let me amend that. He was approached by Mr. Avni and Mr. Rosenthal on separate occasions and told about the Galaxy marketing plan and he agreed to join.

Q Was there any arrangement made with Mr. Kirsch?

A Yes. He filled out an application and agreement form, which stated that he would receive a distributorship if he performed certain functions in the -- in the corporation and also he was told that because of his particular expertise in the field of purchasing or marketing as we called it, that subsequent to his joining the company, he would be allowed to exercise his expertise in -- in a management position, in that particular expert field.

Q Was Mr. Kirsch required to attend all Galaxy

meetings, that is, the Opportunity and Sunday Step-Up Meetings?

A He was not required to attend all Opportunity Meetings, but there was a policy set aside by the board of directors that all executive vice-presidents must attend all Step-Up meetings, unless some prior arrangements had been made, usually at least a week in advance.

Q Now, Mr. Lieberman, you testified earlier that you attended all Sunday Step-Up Meetings except for one or two; is that correct?

A That's correct.

Q Now, at those Sunday Step-Up Meetings that you attended, did you see Mr. Kirsch present also?

A I believe he was excused from two or three Step-Up Meetings that I attended, but other than that he was there all the time.

Q Now, do you know when Mr. Kirsch left Galaxy?

A I believe it was the last week in January of 1973.

Q Now, what were the circumstances, Mr. Lieberman, under which Mr. Kirsch left Galaxy?

A Well, Mr. Kirsch had been under fire quite a bit in his particular department during that time. He was working very hard. He had some agreement -- disagreements

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with Mr. Horowitz, particularly, who was working with him, in his department, and he eventually resigned from the company.

As I say, I think that took place the last week in January.

Q Did Mr. Kirsch, Mr. Lieberman, ever tell you at any time that he was planning to leave Galaxy because no commissions were being paid on the pilot food program?

A No.

Q Now, Mr. Lieberman, did it ever come to your attention during the time that Mr. Kirsch was associated with Galaxy that he was in effect associated with another company?

A Yes, it did.

Q What was that other company?

A The other company was Futuristic Foods.

Q When did this first come to your attention?

A Mark Glazer gave me a business card from Futuristic Foods. It was the first card I'd ever seen. As a matter of fact, it was the first time I had -- I had known -- I had heard that this company was being formed. It was the first time I had ever seen any documentation of any type on the company. It had Mr. Kirsch's name on it.

Q Did it have a title or position?

A No, I don't believe so.

Q But it had Mr. Kirsch's name on it and Futuristic

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Foods, Inc.?

A That's correct.

Q When did you first see the card, Mr. Lieberman?

A In January of 1973.

Q Was this while Mr. Kirsch was still a part of the Galaxy executive board?

A He had not resigned. That's correct.

Q Now, Mr. Lieberman, at the executive board meetings that you attended, did you ever take notes of these meetings?

A Yes, I took notes at all meetings.

Q Mr. Lieberman, could you tell us why you took notes at these meetings?

A Well, certain tasks were assigned to individuals, certain things I wanted to bring up. Every person at the meeting submitted an oral report of his past week's activity and what he was planning for the future week or so, or any long-range plans that he had made, any people he had contacted and I wanted for my own personal benefit to know what was going on.

MR. GARMANSKY: At this time I'd like to mark for identification as Plaintiff's Exhibit 13, a four-page document. The first two pages are yellow with handwriting on it. The last two pages are white with

type print on it.

THE CLERK: So marked as Plaintiff's Exhibit No. 13 for Identification.

xxx (So marked.)

MR. GARMANSKY: May I mark that Plaintiff's Exhibit 13-A, to keep them in sequential order.

THE CLERK: 13 is the first number.

THE COURT: Which is which now? You want one marked --

MR. GARMANSKY: I have four documents, your Honor. I'd like to mark them 13-A, B, C and D.

THE CLERK: This is 13. Give me -- I'll give you 13-A, B and C.

MR. GARMANSKY: The next document I'd like to mark is Plaintiff's Exhibit 13-A, containing seven pages, the first page is yellow with ink handwriting. The last six pages is a memorandum to the executive board and board of directors from Charles Horowitz and the date on it is May 29, 1972.

THE CLERK: This will be marked 13-A for Identification.

xxx (So marked.)

MR. GARMANSKY: All right. Plaintiff's Exhibit 13-B, two pages, yellow paper, ink handwriting,

and it has a date of June 5, 1972.

THE CLERK: So marked 13-B for Identification.

xxx (So marked.)

THE COURT: What was that date again?

MR. GARMANSKY: June 5, 1972.

THE COURT: Thank you.

MR. GARMANSKY: I'd like to mark as Plaintiff's Exhibit 13-C for Identification a one-sheet, yellow page, with ink handwriting on it. It has a date of June 26, 1972.

THE CLERK: So marked as Plaintiff's Exhibit 13-C for Identification.

xxx (So marked.)

MR. GARMANSKY: Your Honor, for the benefit of the record, I forgot to mention Plaintiff's Exhibit 13 for Identification is dated May 22, 1972.

Plaintiff's Exhibit 13-A for Identification is dated May 30, 1972.

THE COURT: I had May 29th. Am I mistaken?

MR. GARMANSKY: Pardon?

THE COURT: I thought it said May 29th. Are you speaking of the yellow part?

MR. GARMANSKY: Plaintiff's Exhibit 13, the yellow part is dated May 22nd.

THE COURT: Yes.

MR. GARMANSKY: 1972.

THE COURT: I have that.

MR. GARMANSKY: Plaintiff's Exhibit 13-A, just the yellow portion is dated May 30, '72.

THE COURT: All right. I get it.

BY MR. GARMANSKY:

Q Now, Mr. Lieberman, do you recognize what has been marked for identification as Plaintiff's Exhibit 13, 13-A, 13-B and 13-C? .

A Yes, I do.

Q Could you please explain what these documents are marked Plaintiff;s Exhibits 13-A -- Plaintiff's Exhibits 13, 13-A, B and C?

A All right. Plaintiff's Exhibit 13 is my notes on an executive board meeting, May 22, 1972, and attached to it is a report by John Celano on who -- who was the executive vice-president in charge of administration on prices of call directors and the ACD system of telephones from the telephone company.

Q Who prepared Plaintiff's Exhibit 13, just the handwritten portion?

A That is my handwriting and I prepared it. 13-A is my notes on the executive board meeting of May 30, 1972,

and the first three white pages are a report by Charles Norowitz to the executive board and [illegible] was present at a board meeting on the 30th.

The next page is a report, next three pages, I believe -- yes, next three pages is a report that was presented by Steven Roth, right, to the executive board on results of Buffalo trip and step-up procedures and protection of property and documents to Galaxy Foods.

Q Who prepared the notes on Plaintiff's Exhibit 15-A?

A The yellow page?

(Continued on next page.)

c fols.

GR/nc
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DIRECT EXAMINATION

BY MR. GARMANSKY: (Cont.)

Q Yes.

A I prepared the yellow page. Plaintiff's Exhibit 13B is two yellow pages of notes on an executive board meeting, June 5th, 1972 and I prepared these and Plaintiff's Exhibit 13C is an executive board meeting -- notes on an executive board meeting prepared by myself June 26, 1972.

Q Now, Mr. Lieberman, the dates on the yellow pages on each exhibit, was that the date that the notes taken by you were prepared?

A Yes.

Q Now, Mr. Lieberman, was Mr. Kirsch present at any of these meetings?

A May I see the notes?

Q Yes.

A Plaintiff's Exhibit 13, Mr. Kirsch was present. He submitted a report on marketing at that time. 13A, Mr. Kirsch was present, again there are notes on marketing. 13B, Mr. Kirsch was present and there is a report evidenced for -- as far as marketing is concerned. And 13C, Mr. Kirsch was present. His name is written in there as delivering a report on marketing.

MR. GOIDEL: Your Honor, may I see those documents?

MR. GARMANSKY: I haven't offered them.

MR. GOIDEL: HE's refreshed his recollection.

THE COURT: You'll -- wait until cross-examination.

MR. GOIDEL: Fine.

THE COURT: You want to get there, don't you?

MR. GOIDEL: Yes, your Honor.

MR. GARMANSKY: At this time the Commission would like to offer into evidence what has been marked Plaintiff's Exhibit 13, 13A, 13B, 13C.

MR. GOIDEL: Your Honor, I don't wish to take the Court's time now reading each one of these documents. We are near recess and so I would respectfully say that I have no objection at this moment, subject to perhaps during the lunchhour my reading this and then making whatever objection I wish.

THE COURT: Well, Mr. Garmansky, is it essential for the further progress of your case to have these in evidence at this time?

Can I hold that ruling in abeyance until he has an opportunity to go over them?

MR. GARMANSKY: That's fine, your Honor.

THE COURT: All right. Let's do it that way.

MR. GARMANSKY: Your Honor, there is just one of these that I am going to question the witness further on. I believe it's Plaintiff's Exhibit 13A.

MR. GOIDEL: Perhaps I can read that very quickly.

THE COURT: All right. Unless the witness -- the witness is certainly free to refresh his recollection.

MR. GARMANSKY: We don't have to offer it in evidence now so we can just wait.

MR. GOIDEL: Fine.

DIRECT EXAMINATION

BY MR. GARMANSKY: (Cont.)

Q Now, Mr. Lieberman, I'd like to show you again what has been marked as Plaintiff's Exhibit 13A.

Now, at that particular executive board meeting held on May 30, 1972, in which Mr. Kirsch was present, as you just testified, was there any discussion concerning Step-up Meetings?

A Yes, there were.

Q Would you please state what those discussions were, who said what?

A Well, as part of Mr. Roth's report, he was at

the time executive vice president in charge of field operations.

He was notified that he was going up to Buffalo and he said before he went up to Buffalo he'd like to present some suggestions for Step-up procedures and he was prepared at that time with this page that I alluded to before, which says "Step-up Procedure" on it.

He had -- handed one out to everybody at the meeting, which was all the executive vice presidents and the Board of directors. Also included Mr. Katz, who was, I believe, the president of the executive board at the time.

And we discussed it. We discussed each item and -- it was a very brief discussion since we were basically all in agreement on it.

Q Now, Mr. Lieberman, you testified earlier that your position at the beginning of Galaxy was secretary-treasurer; is that correct?

A THat is correct.

Q Did that -- did you hold any other positions in Galaxy, throughout the entire existence of Galaxy?

A Well, yes. First of all, I was a distributor, as we've alluded to before. Also when Mr. Rosenthal left in, I believe, June of 1972, at thattime a meeting of the remaining shareholders was held and Mr. Horowitz became the

secretary-treasurer. Mr. Avni became the president of the company, of the corporation. I became the corporate vice president and chairman of the board.

MR. GARMANSKY: Your Honor, the Commission has no further questions.

THE COURT: Mr. Goidel, are you prepared to go ahead for a while?

MR. GOIDEL: Yes.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. GOIDEL:

MR. LERNER: Have they been marked?

THE COURT: The ruling has been reserved on their admission into evidence until Mr. Goidel has had a chance to examine them.

He hasn't had a chance to examine them.

MR. GARMANSKY: Mr. Goidel stated that he would use them for the purpose of cross-examination.

THE COURT: He's free to do that, inasmuch as the witness identified them as notes he made. He may do that. I would have to say this.

MR. GOIDEL: All right, your Honor.

THE COURT: Admissibility, on something of this sort, in view of the witness' testimony, would

be that they were records made and kept in the regular course of business.

They might qualify as -- as his notations as he indicated of these executive board meetings and what was discussed.

In lieu of something more formal.

MR. GOIDEL: Your Honor, I have enough other areas to go into without resorting to that for the moment.

THE COURT: You are withdrawing your objection to the admissibility?

MR. GOIDEL: Yes.

THE COURT: All right.

We will consider them for whatever --

THE CLERK: Plaintiff's Exhibits 13, 13A, 13B and 13C marked in evidence.

(So marked.)

THE COURT: Okay.

BY MR. GOIDEL:

Q Would you turn to the pages in that book that you say -- that's Plaintiff's Exhibit 11 -- that you say Mr. Kirsch prepared?

A Yes.

Q I show you this document and ask you if you've

ever seen this before?

A No, I have not.

Q Did Mr. Kirsch ever bring this to your attention?

MR. GARMANSKY: Objection, your Honor.

MR. GOIDEL: This is cross-examination.

MR. GARMANSKY: The witness has said he's never seen the document before.

MR. GOIDEL: This is cross-examination.

THE COURT: Hold it just a minute.

What was the answer of the witness?

MR. GARMANSKY: He said he's never seen the document before. Mr. Goidel then asked him: Did Mr. Kirsch bring this to your attention?

THE COURT. Did not?

MR. GOIDEL: He said he did not see the document.

THE COURT: All right. But the form of the question is: Did not Mr. Kirsch bring that document to your attention?

MR. GARMANSKY: No. I think it's, did Mr. Kirsch bring this document to your attention?

THE COURT: Did --

MR. GARMANSKY: Did. I believe that was the question.

MR. GOIDEL: Did.

THE COURT: If you'll put the word "not" in there, did not Mr. Kirsch, I'll permit you to ask that question.

MR. GOIDEL: Fine.

BY MR. GOIDEL:

Q Did not Mr. Kirsch bring this document to your attention?

A Not to the best of my recollection.

THE COURT: All right.

MR. GOIDEL: May we have this marked for identification?

THE COURT: All right.

THE CLERK: Yes, sir.

THE COURT: What is it? Is that typed or mimeographed?

MR. GOIDEL: Part is typed. Well, it's -- it's a mimeograph article.

THE COURT: All right.

THE CLERK: A five-page document marked for identification as Defendant's Exhibit D, like David.

(So marked.)

THE CLERK: That's Defendant Kirschenblatt.

BY MR. GOIDEL:

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Q Now, that book contains material that was prepared by various individuals; is that correct?

A That is correct.

Q The work prepared by an individual, was it shown to all of the other individuals who worked on this book or prepared other articles in connection with?

MR. GARMANSKY: Could we be more specific, your Honor, and have what individual?

MR. GOIDEL: All right.

Q List for me the names of all people who prepared articles in connection with the preparation of this book?

A Just articles?

Q Yes, sir.

A Okay.

Mr. Katz, Mr. Horowitz, Mr. Roth, Mr. Kirsch and those are the ones I know that did.

Q Was the article prepared by Mr. Katz shown to Mr. Kirsch before it was incorporated in the book?

A I do not know.

Q Was the article prepared by Mr. Kirsch shown to Mr. Katz?

A Yes, it was.

Q Before?

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A Yes, it was.

Q Yes.

Was the article prepared by Mr. Horowitz shown to Mr. Kirsch before it was incorporated in the book?

A I do not know.

Q Was the article prepared by Mr. Kirsch shown to Mr. HOrowitz before it was placed in the book?

A Yes, it was.

Q Now, who were the others, sir?

A Mr. Roth.

Q How about Mr. Roth's article, was it shown to Mr. Kirsch before it was incorporated in the book?

A I do not know.

Q How about Mr. Kirsch's article, was it shown to Mr. Roth before it was put in the book?

A Yes, it was.

(continued next page.)

BS flws.

Q Anyone else?

A Mr. Marinaccio only did the layout.

Q Fine. In other words, Mr. Kirsch was not called upon to approve or pass upon the articles written by the others, but the others were called upon to look over what Mr. Kirsch had prepared?

A That is correct.

MR. GARMANSKY: Objection, your Honor. It's not what the witness said.

MR. GOIDEL: I believe it is, your Honor. I am asking him what he said.

THE COURT: It sounds to me as if it is a sum up of what he is saying.

MR. GARMANSKY: Mr. Goidel used the word "approval, in his question. Before it was only "shown." There is no foundation laid for "approval" or anything else.

MR. GOIDEL: I will withdraw the word "approval."

Q The articles prepared by the others were not shown to Mr. Kirsch, but the article prepared by Mr. Kirsch was shown to the others?

A That's correct.

Q Will you explain to us why.

A This book was to be used primarily as, you will excuse the expression, closing tool. That was my understanding,

that was the understanding that we created the book for in the first place.

The people who were in charge of that particular area were Mr. Roth, Mr. Horowitz and Mr. Katz.

MR. GARMANSKY: Your Honor, if I may make a statement, I have an objection. Could I have the witness answer read back previously to Mr. Goidel's phrasing of the question of my objection?

THE COURT: See if you can find that (addressing the court reporter).

(Record read.)

MR. GARMANSKY: Your Honor, I move to strike his answer because it was not responsive to the question, as I understand the question.

THE COURT: He didn't get a chance to finish it. He was starting to explain why, so I thought. He got as far as saying that they were in charge --

MR. LERNER: Your Honor, if I may: The witness testified that he did not know whether the work of Mr. Roth and the other individuals he mentioned were shown to Mr. Kirsch.

MR. GOIDEL: He did say --

THE COURT: He said they were not.

MR. LERNER: He said he did not know if they were

not.

MR. GOIDEL: Only in the instance of Mr. Roth. In all the other instances he knows it was not shown.

MR. LERNER: The record will speak for itself.

MR. GOIDEL: Yes. May we proceed, your Honor?

THE COURT: Yes.

Q Will you explain to us why?

A I've gotten very confused.

THE COURT: You started to say that Katz, Horowitz and Roth were in charge of something.

THE WITNESS: The purpose of this book was -- we called it, and it was known in the inner circles amongst the distributors, as a distributor's closing book.

MR. GARMANSKY: Your Honor, the witness is answering -- he is not answering a question. I don't know what the witness is talking about at this point.

THE COURT: I do.

MR. GARMANSKY: What is the pending question?

MR. GOIDEL: Your Honor, if I may interject --

THE COURT: Mr. Garmansky, I have allowed you great liberality in bringing out from this witness what he knew was going on inside Galaxy. I am not going to turn off the faucet now that Mr. Goidel is

examining him.

It is perfectly clear what this witness is saying, and in all probability what he will say after that.

MR. GARMANSKY: Your Honor, just so I understand, is the witness answering Mr. Goidel's question --

THE COURT: It certainly seems responsive in the sense of an explanation, just as you got rather lengthy explanations that ended up with some understanding of what was being done.

Go ahead. Because they were in charge --

THE WITNESS: This was known as a closing book. Those people were in charge of closing wholesale sales; in other words, the sale of franchises. The purpose of this book was to give to prospective distributors. We wanted information on supermarkets in here. We went to the man who was supposed to be doing the purchasing of supermarket items and told him to put that information in here.

But it was a tool of the departments headed by Mr. Katz, Mr. Roth and Mr. Horowitz. That's why Mr. Kirsch's only function was to give us the information that was requested by those departments.

Q Sir, did you look over the material prepared

by Mr. Kirsch before its insertion in this manual?

A I was not involved with the preparation of this book.

Q At any time thereafter, after its publication, did you look it over?

A To some extent, yes.

Q Did you find any inaccuracies or misstatements of fact contained in the articles prepared by Mr. Kirsch?

A I wasn't looking for them. I don't remember finding any inaccuracies.

Q Did anyone ever call to your attention as an officer of the corporation any inaccuracies or misstatements of fact contained in the article, purported to have been prepared by Mr. Kirsch?

A In all fairness, they would have had to have done this research over again to have found any. I don't recall anybody saying there was anything inaccurate about it.

Q Have you ever heard of Professor Allan Meredith, Rutgers University?

THE COURT: Meredith?

MR. GOIDEL: M-e-r-e-d-i-t-h, your Honor, Professor Allan Meredith.

A No, I did not.

Q Sir, if I were to tell you that Professor Allan

Meredith wrote an article substantially the same as that, and that it was called to your attention and shown to you by Mr. Kirsch, would that in any way refresh your recollection as to whether or not you passed upon or in any way approved the accuracy of the statements made by Mr. Kirsch in his article?

A You mean this article?

Q Yes, sir.

A I was not involved with the preparation of this book. I never saw that article.

Q You never saw the article that I am referring to?

A That's right, Mr. Meredith, that's right.

Q Sir, I am a little bit confused, see if you can help me out. You have referred to a Board of Directors during the course of your testimony and you have referred to an Executive Board during the course of your testimony. Are they the same?

A No, they are not.

Q Sir, what is the Board of Directors, or who comprised the Board of Directors?

A The Board of Directors comprised the shareholders in Galaxy, with the exception of Mr. Horowitz who was a member of the Board of Directors after Mr. Rosenthal left -- he was not a shareholder. There was always three members of the

Board of Directors at all times.

Q What was the function of the Board of Directors?

A They in essence controlled the corporation and appointed managers to deal in separate functions of the corporation.

Q Was there any agreement existing between the three directors as relates to their voting for each other to become members of the Board of Directors, or restricting the sale of their stock or anything of that sort, sometimes referred to, sir, as a shareholder's agreement?

A Yes, there was.

Q Was there any such document?

A There was.

Q Where is that document?

A I have a copy of the shareholders agreement. I assume that it is with the corporate minutes.

Q Where are the corporate minutes, sir?

A I believe they are right on the table over there.

MR. GOIDEL: May I ask your Honor to see the shareholders agreement?

THE COURT: Yes. If they are available.

MR. GOIDEL: Yes.

MR. LERNER: Your Honor, will the record reflect we handed Mr. Goidel the entire corporate minutes.

MS. MYSLIWIEC: Corporate book.

THE COURT: It may be so reflected in the record. Perhaps if you showed that volume to Mr. Lieberman he could identify what it is he is referring to.

Q Sir, can you tell us whether the shareholders agreement is contained in this book (handing to witness)?

A I do not see it.

Q Was it at that book, sir, at any time?

A I don't recall.

Q Do you have a copy of that shareholders agreement?

A Yes, I do.

Q Do you have a copy of that shareholders agreement here in court?

A No, I do not.

Q Where do you maintain or keep that record, sir?

A In my home.

Q If I asked you to bring it to court tomorrow, sir, would you do so?

A I would do it if I could find it.

Q Fine. Now, sir, would you tell me where the Executive Board was.

A The Executive Board of Galaxy Foods was set up to run the various functions of the corporation.

In other words, they were more or less executive department heads and they met jointly to discuss matters which affected all departments, if necessary, to approve or pass on the purchasing of equipment; anything that would affect Galaxy Foods. The Executive Board also included the directors of the corporation.

Q Were votes taken at meetings of the Executive Board?

A Yes, Mr. Goidel, they were.

Q O.K. Fine. Let us assume, sir, hypothetically, that someone proposed buying a truck for the corporation; would a vote be taken on that question at the Executive Board?

MR. GARMANSKY: Objection, your Honor.

THE COURT: I will allow that.

A More than likely it would be discussed, but no vote would be taken.

Q Who would have made the decision to buy trucks?

A I would say that the Executive Board would have expressed its desires toward the thing, but the final decision would have to be made by the directors of the corporation.

Q That's a fact, sir, that such a decision for the expenditure of any large sum of money would have to be made by the shareholders and directors of the corporation, namely, the three persons whom you have named previously; isn't that

correct?

MR. GARMANSKY: Objection, your Honor.

MR. GOIDEL: This is cross-examination.

MR. GARMANSKY: I would like Mr. Goidel to define, "large sums of money." If there is a demarcation here, please let the record reflect it.

MR. GOIDEL: I will be specific, your Honor.

THE COURT: I will overrule the objection. I will ask you to put to this witness the question of his judgment as to what sum of money might be, you might say, above the floor line here.

MR. GOIDEL: Fine.

Q Sir, answer that question, what would in your opinion constitute a large expenditure that could not be made without the approval of the Board of Directors?

A Anything over the normal operating expenses for a department. In other words, let's say -- we were working on budgets. Let's say that the normal operating expense of Mr. Quack's department, the warehousing, was a thousand dollars a month or a thousand dollars a year, whatever that figure may be, and he said, "I want to go out and purchase $52,000 worth of shelving," or, "I want to go out and purchase cardboard cartons." Which he did say. Those were offered at the Executive Board meeting for discussion, to find out

if there were any alternatives, and if there were not, ther. they were authorized by the Board of Directors and the expenses were met by the Board of Directors of the company.

Q Again, sir, I will ask you -- I understand that $52,000 is a lot of money. How about $500?

A No, I don't think that that would be out of the norm for the operation -- in other words, I don't think that would be approved.

(Continued on next page.)

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CROSS-EXAMINATION

BY MR. GOIDEL (Cont'd):

Q Could Mr. Kirsch have spent $500 without approval of the board of directors?

A He did on many occasions.

Q For what?

A For the purpose of food.

Q But, sir, didn't the board of directors authorize him to go out and purchase the food?

A Yes.

Q Yes. So, in effect, while they didn't say "Mr. Kirsch, go out and spend $10,000," they went out and said to him, "Buy X type of food, and whatever it cost the corporation will pay"?

MR. GARMANSKY: Objection, your Honor.

Q Isn't that so?

MR. GARMANSKY: Objection. Mr. Goidel is -- he's making a question and then he's drawing conclusions that the witness has not said. He said: Isn't it a fact that the board of directors told Kirsch to buy X type of food?

We're only talking about money here. There has been no testimony of who had control over what type of food was bought.

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I would like the question to be rephrased.

THE COURT: I am not too sure I understand fully your objection, Mr. Garmansky, but I am perfectly willing to have Mr. Goidel rephrase a question.

MR. GOIDEL: Your Honor, I will take it step by step then.

Frankly I was trying to save a little time.

BY MR. GOIDEL:

Q What was Mr. Kirsch's function in this business?

A He was executive vice-president of marketing, and he sat on the executive board of the company. He did all the purchasing that would be -- had been necessary to fill the warehouse up. He was supposed to align these purchases with our catalogue. He was supposed to set retail prices for the catalogue. He was to work with the warehousing people in setting up the order of the products. He was to keep a constant inventory. He was to re-order. He was to work with administration in the code numbers so that the -- the computer could -- he had quite a few functions, in other words.

Basically everything to do with the -- the buying and sale to a certain extent of the products.

Q And by products, we mean grocery type items?

A 3,600 supermarket items.

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Q Thank you.

Now, sir, was a budget established by anyone in the corporation for the purchase of these items?

A Yes. The executive board was -- was told approximately how much money we had at that time and how much money we intended to spend on the food in the beginning.

Q You say that the executive board was told how much money we intended to spend. Who is"we"?

A Galaxy Foods, Inc.

Q I see. And who made the judgment as to how much money we were going to spend?

A I think it was the entire executive board.

THE COURT: Let me ask you this,if I may, Mr. Lieberman.

Did the executive board ever get to the point of each vice-president getting up a proposed budget for his department?

THE WITNESS: Yes, it did.

THE COURT: And how early in the game would that occur?

THE WITNESS: Well, the first budget was submitted very early in the game. I would say something like January of '72. However, these budgets were amended at times as necessity -- for instance --

THE COURT: I understand that.

THE WITNESS: Okay.

THE COURT: But as early as this organization really -- really got started in September of '72; is that right?

THE WITNESS: That's correct.

THE COURT: And by January, '72, were all these executive departments formed and headed up by individuals who were on the job?

THE WITNESS: Yes, your Honor.

THE COURT: And they -- so their respective needs and they proposed a budge for their respective departments.

THE WITNESS: Not quite. When Mr. Franz Quack came on the board, he had a great deal of expertise in -- in the food business and particularly in departmental business. Mr. Quack worked with each one of the executives, found out what they needed, in discussion with them on an individual basis and then in a report to the executive board he proposed the budgets for each department.

BY MR. GOIDEL:

Q And whom did he propose this to?

A The executive board.

Q And then what did the executive board do?

A There was some discussion -- inter-departmental discussion. For instance, one department might say: Well, I don't know if trucking needs that much, or something like that. You know, that sort of thing. But we conducted a very extensive -- as a matter of fact, I believe it was a whole day's discussion on that -- on those proposals.

THE COURT: In other words, everybody was given an opportunity to be heard with respect to his own needs as compared to the stated needs of somebody else; is that the idea?

THE WITNESS: He was given a chance to be heard on his own needs and on everybody -- and on everybody else.

THE COURT: Right. As a result of that, perhaps changes were made in these proposed budgets?

THE WITNESS: That's correct, your Honor.

THE COURT: Then was the budget as proposed -- what was done after that?

THE WITNESS: I don't remember if it was passed at that meeting or it was held over for another meeting of --

(Continued on next page.)

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CROSS-EXAMINATION

BY MR. GOIDEL: (Cont.)

Q Didn't the Board of Directors ever look it over?

A We were in the executive board.

Q I understand you were on the executive board?

THE COURT: Yes.

Q Didn't you ever look it over and discuss it amongst the three of you in private?

A No, we did not.

Q Now, sir, let me understand.

THE COURT: Let me ask you this. Perhaps this might clarify things. Was it customary for the members of the board of directors to be part of these executive board meetings?

THE WITNESS: That is correct.

THE COURT: So the people who constituted the Board of Directors were present at the executive board meetings?

THE WITNESS: That is correct.

THE COURT: And presumably also participated in discussions concerning such matters as the budgets of each department and so forth?

THE WITNESS: That is correct, your Honor.

BY MR. GOIDEL:

Q Now, sir, let me ask you a question. What was discussed in the Board of Directors' meetings that were not discussed at the executive board meetings?

A Oh --

Q You can take it step by step. Any meeting you want.

A One of the things I know was salaries of the executives. Promotion of the executives, volume of business, promotion of anybody from the field.

In other words, from the distributors and field managers. Although that sort of thing was discussed sometimes, too, at the executive board. Any corporate policies relating to the operation or proposals in front of the executive board of officers, the final decision on whether lr not to rent the warehouse that we took. The final decision on what type of computer to have. And to my knowledge, that is all that was discussed there.

Q Who prepared the agenda that was to be set before the executive board?

A The president of the executive board.

Q And he was who, at the beginning?

A And subsequently was there any other president of the executive board?

A Yes, Mr. Katz.

Q Did Mr. Katz own stock in the corporation?

A He did not.

Q At any time?

A He did not.

Q And did Mr. Horowitz own stock in the corporation at any time?

A He did not.

Q Now, did the Board of Directors ever refuse to expend monies which the executive board requested be spent?

A Not to my knowledge.

Q Okay.

What is the largest amount of money that the Board of Directors allowed the executive board to pass upon, if you know?

A I believe -- you mean, in one lump sum? Is that what we are talking about?

Q Yes.

A Okay.

I think it was Mr. Celano's department and that was the purchase of the computer.

Q Now, could the executive board fire you, sir?

A No.

Q Sir, if we take a vote on everything and the executive board concluded that they wanted to get rid of you, why couldn't they not get rid of you?

MR. GARMANSKY: Objection, your Honor, as being argumentative.

MR. GOIDEL: It's not argumentative.

MR. GARMANSKY: He said the executive board could not fire him, the witness.

MR. GOIDEL: I'm asking him why not if we're running by virtue of a majority vote.

THE WITNESS: Because I was a corporate officer.

BY MR. GOIDEL:

Q Oh. There is a distinction between a corporate office --

A I was a shareholder.

Q --and an executive officer?

A There is.

Q Tell me what it is.

A What it is is that corporate officers could sign checks. Corporate officers could demand decisions made the way they ruled. Corporate officers could fire executives. Corporate officers could virtually run the business without the executive board.

However, that would be very foolish, in our case.

Q Well, obviously all good men need good men to work for them?

A That is correct.

Q Right?

A Yes.

Q What you are saying to me, if I understand it, is that the Board of Directors delegated authority to an executive board and as long as the executive board functioned in accordance with what the Board of Directors thought was reasonable, they would allow it to go?

A That's exactly right.

Q But they had a veto power over everything, didn't they?

A The executive board?

Q No, sir.

The board of directors had a veto power over absolutely anything done in that corporation?

A Yes, they did.

THE COURT: Well, I have reached the conclusion that all officers should now go to lunch. It being after 1:00 p.m., so let's recess until 2:00 o'clock.

MR. GOIDEL: May we make it 2:15 again, Judge. It takes us ten minutes to walk to the place.

THE COURT: All right. Recess until 2:15.

(Luncheon recess.)

AFTERNOON SESSION

MR. GOIDEL: Your Honor, I have read over the exhibits that have been offered in evidence, and I have no objection to their introduction.

THE COURT: All right.

MS. MYSLIWIEC: They have already been marked in evidence.

MR. GOIDEL: Is that right, sir?

THE CLERK: Yes.

THE COURT: I believe they have already been marked on the assumption that you wouldn't have any problem.

ARTHUR J. LIEBERMAN, having been previously sworn by the Clerk of the Court, resumed the stand, and testified further as follows:

CROSS EXAMINATION (Cont'd)

BY MR. GOIDEL:

Q Sir, how much money did you earn while associated with Galaxy?

A I don't know.

Q Do you have any idea?

A I can offer a guess.

Q Give us as educated a guess as you possibly can.

MR. GARMANSKY: Objection, your Honor. I believe that the figures would possibly be in the

books and records that we brought today.

THE COURT: He is playing the best evidence rule back into your teeth, Mr. Goidel.

MR. GOIDEL: Your Honor, the records provided me do not encompass the entire period of time that this gentleman was associated with Galaxy Foods.

THE COURT: Do they provide a reliable starting point?

MR. GOIDEL: November of 1971 is the earliest notation.

THE COURT: The earliest notation?

MR. GOIDEL: The earliest. We are missing August, September, October.

THE COURT: I am not so sure I understand that. You say the earliest notation is when?

MR. GOIDEL: November.

THE COURT: So you need the first two months?

MR. GOIDEL: Yes.

THE COURT: Maybe you didn't get paid for those months, is that true?

THE WITNESS: I don't recall, your Honor. I imagine I did.

MR. GOIDEL: We will shortcut it. We won't play games.

Q Sir, the records that I have looked at indicate that you are listed as having received approximately $92,000 in approximately one year and ten months. Would that be an accurate statement?

A That is --

THE COURT: One year, ten months?

A I can't say that would be an accurate statement unless -- you are saying that is what the books represent?

THE COURT: Let me ask you this. Did you, by any chance prepare an ad hoc schedule that might, if reviewed by counsel of the Commission, be offered in evidence in lieu of extended testimony on this subject?

MR. GOIDEL: Well, sir, what we did , for each month listed there, we put down the payment as to this gentleman personally.

THE COURT: I suppose the witness should take a look at it. Do you mind?

MR. GOIDEL: Not at all.

THE COURT: Suppose you glance at that yellow sheet that Mr. Goidel apparently prepared on the basis of his examintion of records during the lunch hour.

THE WITNESS: Okay, your Honor.

What is your question?

Q Well, sir, first look at this.

A I did.

Q Having looked at this, sir, would this refresh your recollection to any extent that would give you any reasonable grounds to believe that you earned approximately $92,000 in the one year, ten month period that we are speaking of?

A That would be incorrect.

Q That would be incorrect?

A Incorrect.

Q Would you tell us --

THE COURT: Will you explain why?

THE WITNESS: Since apparently this came out of the cash disbursement journal, also included in there are any monies which were rebated to me after I purchased anything. This is not the listing of what I earned.

Q Well, how much money did you earn as distinguished from monies that may have been reimbursed you, if you know?

MR. GARMANSKY: Your Honor, I have my objection previously to that question, as the best evidence

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we have are the cash disbursements journal of Galaxy and they are here presently. The witness has no recollection as to how much he earned.

THE COURT: I am not altogether sure the witness has come forth with that definiteness. I take it that Mr. Goidel assumed -- was there a ledger sheet headed up with the witness's name?

MR. GOIDEL: There is just a disburement sheet, your Honor, and next to various items, his name.

THE COURT: Day by day?

MR. GOIDEL: Yes, sir.

THE COURT: Daily journal?

MR. GOIDEL: Yes, sir.

THE COURT: So you assumed that any payment to him was compensation?

THE WITNESS: Yes, sir.

THE COURT: And he has explained to you now that it was not?

MR. GOIDEL: Yes, sir.

THE COURT: Was there a regular payday?

THE WITNESS: Your Honor, I believe we were paid every two weeks.

THE COURT: So that if you were shown the ledger in question, perhaps you could call out what

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you regard as your salary payments and Mr. Goidel could tick them off on the sheet he has and we might then arrive at a compromise for present purposes, without impairing your right to cross examine him on the other numbers. Do you understand?

MR. GOIDEL: Yes, sir.

THE COURT: Only to get a starting point here so we won't fluster around --

MR. GOIDEL: May I take it an absolutely different way then, your Honor, subject to your approval?

THE COURT: All right.

MR. GOIDEL:

Q You say that Mr. Kirsch was paid one per cent, is that correct?

A I believe my testimony was one-half to one per cent.

Q One-half to one per cent. And I believe you also said that your payment was also based upon a percentage of some sort, is that correct?

A That's correct.

Q What was that percentage?

A Three to four per cent.

Q When was it three?

A I cannot recall.

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Q When was it four?

A I cannot recall. You are asking me specifically what times, I cannot recall.

Q Well, can you limit it then, sir, to a period of time that you were receiveng three per cent, as distinguished from dates, specific dates?

A I believe in the biginning of the company, when it first started, I was receiving four per cent. And at sometime -- I can't make that -- I believe I was receiving four per cent in the beginning for several months, how long I don't know. Then it went down to three-and-a-half as the company's volume started to rise. I believe at the end when Mr. Horowitz became corporate vice president that at that time we were receiving three-and-a-half per cent. But I cannot pinpoint it.

Q Well, now, sir, you heard Mr. Kirsch's testimony, didn't you?

A Yes.

Q And Mr. Kirsch testified that he earned approximately $24,000 during the entire period that he was employed by the corporation, isn't that correct?

A That's correct.

Q Now, at the very least, sir, your earnings, since they were predicated upon the same figures that

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theoretically would have been at least three times, and possibly four times that figure, isn't that correct?

A No.

Q Why not?

A Oh, I see what you mean, while he was earning one per cent, if I was earning my lowest of three per cent, it would be three times, that's correct.

Q And if you were earning four per cent, it would be four times?

A That's correct.

Q And if he were only earning a half of one per cent it would be considerably more percentage-wise, wouldn't it?

A That's correct.

Q So that really, if he earned $24,000, as he statee that he did, that would certainly indicate that you earned somewhere upwards of $90,000, wouldn't it?

MR. GARMANSKY: Objection, your Honor. It is purely speculative.

MR. GOIDEL: Speculative? I am performing a mathematical computation.

THE COURT: In otherwords, he is saying he has done it with mathematical certitude.

MR. GARMANSKY: Multiply three times 20,000,

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whatever it is, don't give $90,000.

THE COURT: It isn't quite as bare-boned as that. The theorem is that if Mr. Kirsch's one per cent produced $24,000 for hi in two years; isn't it likely that Mr. Lieberman's three per cent or four per cent produced for him three times the $24,000 --

MR. GARMANSKY: Your Honor, but it is not --

THE COURT: -- on the assumption that the percentage came off the same gross amount of money, whatever it was, that was the monetary basis for this conversation.

MR. GARMANSKY: I agree with your Honor's last statement. On that assumption. But that is really an inference or something to be used by the trier of fact here.

THE COURT: Let's see what the witness has to say about that. I'm not impairing your objection rights, but it does seem to me that this is not going for afield. I mean a little unclear in my own mind, what was the three or four per cent applied against, what was the base?

THE WITNESS: The volume of money coming in from franchise sales.

THE COURT: That's what I thought it was. You

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say you started at three or four and were later reduced to a lower percentage?

THE WITNESS: I believe I started at four and shortly thereafter we were reduced to three and a half or three, but I can't say which figure, when it occurred.

THE COURT: Three and a half per cent or three per cent. So somewhere from four down to three of monies from sales of franchises.

BY MR. GOIDEL:

Q Is that a net figure or a gross figure that you were predicating this percentage on, net franchise sales or gross franchise sales?

A Would you identify the term, I don't know what you mean.

Q You paid a commission to the person who brought in the applicant if the application were accepted and the franchise were sold. Was the three or four per cent predicated upon the gross amount of monies received from the payment of that commission or predicated upon the figure after the payment of that commission?

A Based on the gross of the sales.

THE COURT: On gross sales. All right. Now, let's see if we can settle this. You

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wouldn't dispute, as I understand it, Mr. Kirsch's testimony that he received $24,000 over two years; is that correct? That is what I thought I heard him say.

THE WITNESS: I would have no independent means of saying that that was the exact figure.

BY MR. GOIDEL:

Q Approximately.

THE COURT: Approximately.

A I would say it sounds reasonable.

THE COURT: Does the one per cent sound correct?

THE WITNESS: The half and one per cent, your Honor, was my testimony, yes, that's correct.

THE COURT: A half of one per cent?

MR. GOIDEL: A half of one per cent to one per cent.

THE COURT: All right. I'm not sure where we have gotten here. Is there any way in which we can double-check this by having the witness look again -- look at the journal itself one way or the other, and perhaps call off, and you can check off the numbers as he calls them off?

MR. GOIDEL: Excepting, your Honor, I haven't yet established which is wnat I'm going into, the accuracy of these books.

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THE COURT: You can go ahead and do that right now. I assume this witness may have some knowledge on that subject.

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CROSS EXAMINATION

BY MR. GOIDEL:

Q Who maintained those books?

A Susan Singer.

Q Did anyone at any time audit these books?

A Oh, yes.

Q Who audited these books?

A Mr. Ronald Ellman. He is a CPA.

Q He would check it and give who a report concerning it?

A The only report we ever got was in 1973, latter part of 1973.

Q Was that a Certified Public Accountant's certified report?

A Yes, it was.

THE COURT: Mr. Ellman is a CPA?

THE WITNESS: Yes.

THE COURT: And Susan Singer was your accountant for bookkeeper or whatever?

THE WITNESS: A bookkeeper.

Q Sir, did you receive any monies other than the percentage released on the sale of franchises?

A Yes, I received reimbursements on any monies that I had laid out.

Q Would you put in chits for that reimbursement?

A Yes.

Q Would you itemize what it was for?

A To a certain extent. If it was a bunch of stationery, we would put down stationery supplies.

Q In other words, you might buy stationery by laying out money out of your own pocket?

A That's correct.

Q Was there any reason, sir, let's say, for buying stationery that way rather than having the corporation billed for the stationery?

A Expediency. I wasn't going to wait for somebody to deliver a roll of scotch tape to us.

Q You used the word stationery?

A Stationery supplies, I said.

Q I see. Would you look through this book -- this is the cash disbursements ledger commencing with November of 1971, and you can either call out the figures now as to what was not compensation, what was not compensation, merely reimbursement, or add it up in your own mind and give us a general figure as to what figures indicating payment to you were not for compensation.

A May I ask if I can do this, since there are a group of checks made out apparently in some sort of

order, everytime one of the executives was paid, and I am including in that, could I say it might be easier for me to call out the checks that were compensation for franchise sales.

THE COURT: I suggest you do that. Were they likely to be -- I suppose they weren't like ly to be in the same amount each time, were they?

THE WITNESS: Mine and Mr. Avni's and Mr. Rosenthal's would have been, your Honor.

THE COURT: In the same amount each time?

THE WITNESS: That's correct.

THE COURT: Why don't you call out those same or similar numbers and Mr. --

THE WITNESS: All right.

THE COURT: -- Goidel can take them down.

THE WITNESS: It is listed as overrides and commissions right here in the third column. $500 --

THE COURT: That is November, starting November?

THE WITNESS: November '71.

THE COURT: Just call off the numbers. He is only interested in the totals.

THE WITNESS: $360. $56. $245.

Q How much was that, sir?

A $245. $50. $157. $100. $200. $50. $455.

Mr. Goidel, do you want also money earned on my own operation of my distributorship?

Q We will go into that next.

A So I have to weed that out, which you apparently don't do.

Q Yes, we did.

A $1,190. $2,870. $450. $4,616.66. $720. $1,440. $1,380. $750. $1,920. $1,715. $3,185. $1,110. $2,490. $2,190. $3,960. $2,880.

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Q Continue, please.

A $9,600.

It was a good month, your Honor.

THE COURT: It sure was.

A (Continuing.) $5,820; $2,790; $1,440.

Q I'm sorry?

A $1,440; $1,890, $2,310; $3,690; $1,680; $990; $645.

You're asking me how much money I received in income? You're asking me how much money I received in income from -- from Galaxy Foods?

Q No sir, not income. Income could be both commission --

A How much money I received of the -- of earnings?

Q As a percentage, as a percentage, three or four percent of the gross sale of franchises.

A Okay. From February --

Q Other than commissions which you eanred when you brought someone in.

A From February 1973 to the demise of Galaxy Foods, I did not receive any more than $175 from Galaxy Foods.

Q That's from February '73 forward?

A That's correct.

Q Okay.

A To the best of my knowledge.

Q Now, sir, let's work on that. First of all, I have added up the figures you have given to me, and they are, if my addition is correct, $65,905. Would I be --

MS. MYSLIWIEC: I have $996.66.

Q All right, at any rate, $69,900 approximately, okay?

A That is incorrect.

MR. LERNER: That represents overrides. Could you define the figure?

MR. GOIDEL: I'm going to.

THE COURT: 65?

MR. GOIDEL: $65,900.

THE COURT: From November '71 to when?

MR. GOIDEL: From November '71 through February of 1973.

BY MR. GOIDEL:

Q Is that correct, sir?

A That's about right.

Q Let's see if we can take some of these figures that you haven't read off.

A Okay. I can tell you that there is $5,000 in commissions on the sales of franchises.

Q 5,000 commissions?

A That was the $5,000 that I gave to Mr. Shevack to come into the business.

Q Okay.

A I did not try to even attempt to add up the petty cash figures.

Q No. I wouldn't expect --

THE COURT: Is that 5,000 above the 65?

Q Is that correct, sir? Above the 65,000?

A Yes. I did not include that, your Honor, when I was reading off those figures.

Q All right. Now, sir, let's take some of the larger items that we -- we've not mentioned so far.

Go to August of 1972. There is an item, $3,750.

A $3,960?

Q $3,750. In August.

A That's correct.

Q Yes. What was that?

A That was a loan.

Q A loan from whom to whom?

A From Galaxy Goods to me, which was repaid in 1973.

Q When in 1973?

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A Actually it was -- I believe I began to pay it out in late November or December and it was paid out by probably June.

Q I see.

Well, that would be reflected then not in the cash disbursements of the company but in the cash receipts book?

A That's correct.

Q Okay, fine. Now let's take another item.

In March?

A Of 1972?

Q Yes sir.

Now, I believe you say that you received no commissions following February?

A '73 you are talking about?

Q Yes, '73? March --

A I received them. Wait.

Q Please. Just hear my question. Just answer my question.

A Sorry.

Q You just gave us figures totalling $65,900 approximately and I believe you stated that after February of 1973 you did not receive your reinumeration of 3 or 4 per cent of the value, total value of the monies realized

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from the sale of franchises?

A I received but I did not retain.

Q Oh, well, all right.

Let's tell me first what you received.

MR. GARMANSKY: Your Honor, I object to this line of questioning on the grounds of relevancy.

MR. GOIDEL: Your Honor, I am certainly cognizant of the questions I am asking. I think they are relevant. They show the position of my clients in relation to this gentleman who is here testifying, who has through various statements made by him, demonstrated that my clients were part of a scheme and that they were part of a large hierarchy standing near the top of that hierarchy, and I have the right to go into exactly what their position was, whether they were ministerial or were they active participants in what the Government alleges is a fraud.

MR. GARMANSKY: Your Honor, I would respectfully suggest that the way to go about it is to ask the witness what they did, not asking the witness how much he was paid.

That doesn't show what the defendants, Mr. Goidel's clients, did.

If he asked the witness how much he was paid.

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We have already --

MR. GOIDEL: I did.

MR. GARMANSKY: We have already established that Mr. Lieberman was paid 3 to 4 times as much, depending on the period of time, as Mr. Kirsch was. We've already established that.

I don't think it's relevant to now go into every penny and to find out exactly when and what time this occurred.

If he wishes to establish that, he can ask certainly more pointed, direct questions.

THE COURT: Well, I will agree with you, Mr. Garmansky, to some extent. I do not think we want to go into an accounting.

MR. GOIDEL: No, I am not going into an accounting, your Honor. But I've added up --

THE COURT: Are there other significant amounts?

MR. GOIDEL: Yes sir. I am only going into large amounts. I am only taking those where thousands of dollars, not hundreds.

THE COURT: I will overrule the objection to that extent because I do think it has relevance, not only on -- one might say the relative positions of

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some defendants as against other defendants and what those might mean in terms of who one might consider the leading parties were as contrasted with the lesser luminaries.

I think it also has a bearing on the question of relief the Commission seeks here which is not only injunctive but disgourgment.

MR. GARMANSKY: I understand your Honor's position but I respectfully suggest that we limit this period of inquiry on just up to the point of time that Mr. Kirsch remained in Galaxy.

After Mr. Kirsch left Galaxy, it's certainly not relevant any longer.

We've established left in January of 1973.

MR. GOIDEL: For the sake of brevity, at this moment I will acceed to his wish.

THE COURT: All right. What we are talking about is the period from November --

MR. GOIDEL: We've already gotten the figures up to February, which is just one month beyond, so I assume you will accept that concession temporily?

Thank you.

THE COURT: All right.

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BY MR. GOIDEL:

Q But, sir, let me ask you this question. These books are accurate?

A I can't testify to that.

Q You relied upon them as an officer of the corporation and you say that they were certified by a Certified Public Accountant; isn't that correct?

A I relied upon them? In what manner?

I didn't rely upon them.

Q All right, sir. You worked for a company; isnt' that correct?

A That's correct.

Q You wanted to be paid; isn't that correct?

A That's correct.

Q You wanted to be paid every penny that was owing and due to you; isn't that correct?

A That's correct.

Q Im certain that when you received a check -- by the way, who made out the checks you received?

A Who made them out? Susan Singer made them out.

Q Who signed them?

A Either Mr. Rosenthal, Mr. Avni, Mr. Horowitz or myself. Two out of those three at any given time.

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Q Fine. When you received this check, was there anything that appeared on it?

A Yes.

Q What appeared on it, sir?

A The percentage and the total volume that it was based on.

Q Percentage and total volume. Okay.

I assume that the total volume was the same total volume that would have appeared on the check that was received by Mr. Kirsch?

A Exactly, Mr. Goidel.

MR. GARMANSKY: Your Honor, may I raise an objection here as to point of clarification?

Was this percentage on the check itself or on possibly the check stub?

THE WITNESS: No. It was -- I see what you mean. It was on the stub. The check was a rather big sized check and it -- the stub was --

(Cont'd on next page.)

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2pmr2

1 Lieberman - cross - Goidel

THE COURT: It was a tear-off portion called the voucher part?

THE WITNESS: Yes. There was that, too. There are actually three parts to the check. There was a check to which a -- a tear-off part was and there was a carbon where a duplicate of the whole face of the whole check was made, and the voucher.

BY MR. GOIDEL:

Q Okay. Now, the same volume figure, as I started to say, that appeared on your check would also appear on the check of Mr. Kirsch; isn't that correct?

A That's correct.

Q Well, now, sir, if you received not less than three times what Mr. Kirsch received and if Mr. Kirsch during this period of time received $24,000, should you not have received at least $72,000?

A I have so testified.

Q No, sir, I'm afraid you haven't so testified. You've read off figures which are at least $7,000 or $8,000 less for that period of time.

A Mr. Goidel, are we talking about $24,000 that he received -- that Mr. Kirsch received only in payroll or are we talking about $24,000 he received including the sale of franchises?

Q Sir, it would make no difference. If you want to lower the figure of salary for Mr. Kirsch, is that what you wish to do? How much did he receive in commission?

MR. GARMANSKY: Your Honor, I have an objection.

A I don't know.

MR. GARMANSKY: Counsel is being argumentative, number one. First of all, it hasn't been established directly by looking in the cash disbursement journal how much money Mr. Kirsch received from the gross sale of commissions.

THE COURT: We'll let somebody do that for redirect, if necessary. I don't want to take the time to go through more accounting.

MR. GARMANSKY: Your Honor, my point is that Mr. Kirsch testified he received commission payments as well as recruitment payments from bringing people to Galaxy.

THE COURT: I don't know whether -- I don't remember that. I'll accept your statement that that was so.

I think for tpresent purposes we want to get back on the track here, which was, I thought, to explore the possibility that Mr. Lieberman, in addition to the $70,900, which he has acknowledged, which

includes that $5,000 he spoke of, received any other amounts which on reflection he might recognize as compensation rather than reimbursement.

MR. GOIDEL: Okay.

BY MR. GOIDEL:

Q Now, sir, in June of 1972, you received the following payments. You don't need it. I'm reading what appears in that book, sir. $250, $500, $500, $250, $3,185.

THE COURT: Which were not previously checked off.

Q The first four figures were not checked, were not spoken of by you in your testimony.

A That's correct.

Q What are they, sir?

A $250 is an override on a field manager bringing in another field manager, when you are a distributor, so that you had two of those. $250.

Q Yes, sir.

A The other one was $500?

Q Yes, sir.

Q That was also commissions.

Q Commissions on what?

A The sale of franchises, not on -- that was all Mr. -- that's what the $5,000 is, Mr. Lieberman. That's

in there, $250, $250. I believe there is a $2,000 one. Then there is another $1,275. $1,250.

If you add those up they come out to $5,000.

THE COURT: In other words, what you are saying is that the $,5000 commissions you mentioned would cover these other payments?

THE WITNESS: That's correct.

THE COURT: All right.

BY MR. GOIDEL:

Q All right. Do you know how many such payments I would have to add up to get that figure?

A Perhaps six.

Q Six?

A Or seven. I don't know exactly.

Q How about a $2,000 figure? Would that be part of it?

A That's a direct distributor coming in.

Q A direct distributor coming in?

A A distributor bringing in another distributor for $5,000 receives $2,000.

Q In other words, you, as a distributor then received an additional $2,000?

A Yes.

Q You received that $2,000 in July? That was

other than your compensation?

A That's correct.

Q All right.

Now, sir, let's see if we can shortcut it to the best of your ability. We've established through your original testimony here just now that approximately $70,000 was realized by you from the sale of franchises, in the nature of salary, that is by taking three or four per cent of the gross volume; isn't that correct?

MR. GARMANSKY: Objection, your honor.

I believe the witness's testimony was that $5,000 was given to Arthur Shevack.

MR. GOIDEL: We're going -- he received it. That's all I'm asking.

MR. GARMANSKY: No. That's my point. He did not testify he received it.

BY MR. GOIDEL:

Q Did you physically receive it, sir?

A Yes, I did.

Q Okay.

Now, that $5,000 plus the other $65,900-plus dollars approximates $70,000; isn't that correct?

A I would agree.

Q All right.

Now, in addition to that $70,000, can you tell us approximately how much money you received on the actual sale of franchises by you as a distributor?

A I had no other sale of franchises.

Q So that all other monies listed on those books as having been paid to you would either be for reimbursement of expenses out of pocket; is that correct?

A That's correct.

Q Or for anything else?

A Or anything coming -- any payments after February, 1973, which we are not talking about.

Q Which we are not talking about?

A That's correct.

Q Okay. Fine.

A Or the $3,750 loan.

C fls.

(Continued on next page.)

CROSS-EXAMINATION

BY MR. GOIDEL: (Cont.)

Q Now, there is a figure in March of $971.

Was that reimbursement?

MR. GARMANSKY: March of what year?

MR. GOIDEL: March of 1972.

Q Was that reimbursement and expense?

THE COURT: What was the figure?

(Record read.)

Q March of 1972. The figure, sir, again is $971.

MR. GUSRAE: Your Honor, at this point I'd like to interpose an objection since Mr. Lieberman is still a party to this action.

I do represent Mr. Lieberman. I see no relevancy of whether -- of the figures that Mr. Goidel is speaking of at this time to the issues remaining in this action.

MR. GOIDEL: If anything else, it certainly goes to credibility.

MR. GUSRAE: Credibility?

MR. GOIDEL: Certainly.

MR. GUSRAE: The amount of money is there. It's on the record. Speaks for itself.

MR. GOIDEL: We're asking.

THE COURT: As I think I said before to

Mr. Garmansky, I think it is a fact the Court should consider with respect to the relationship of the defendants on trial to this organization as compared with other defendants not now on trial.

I think it has relevancy to the question of relief, i.e., what the Commission calls disgorgement.

MR. GUSRAE: Your Honor, that's been settled as to this individual.

THE COURT: But not as to others. And -- so I am overruling your objection. For those reasons.

MR. GUSRAE: Okay, your Honor.

BY MR. GOIDEL:

Q Did you find it, sir?

A Not yet. $971.00?

Q Yes.

A Listed under general expenses.

Q Yes.

A I have no idea what that is. I don't remember receiving $971.00.

Q Well, all right. Let's -- since you don't remember that one --

THE COURT: Well --

A May I say, Mr. Goidel --

Q Yes?

A It was a practice at times when we wanted cash around to make change rather than making out a check to cash, which would be carried to the bank and if the guy got hit over the head, that it was made out to that -- to an individual.

He took it to the bank and cashed it. It provided at least one-way safety.

Q Sir, may I just, without belaboring this point too much further, just give you give you a list of figures? That's $971.00 in March, $450 in April, $500 in May.

None of which are these $250 payments, which you've already explained. $1250 in June.

A The --

Q Yes?

A Wait. $1250 in June?

Q Yes, sir. Very beginning of June.

A The very beginning of June?

Q Yes, sir.

A That was -- I listed that. I'm sorry.

Q No, sir, you did not.

A $1250, that was part of the $5000

Q Well, fine. Okay. That's part of the 5000?

A Yes. It's paid out in commission.

Q I understand.

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THE COURT: I heard him say 1250.

Q What is the total -- what is the 1250 in July? I thought that was the 1250 you were talking about. That's also the very beginning of July.

A That's also a commission check.

Q To whom?

A To me that went to Mr. Shevack.

Q Okay.

Then what is the $2000 figure in July which --

A That's also a commission check.

Q 4500?

A Two $250.00 ones.

Q Okay. Fine. What are the two $500 ones in June.

A Oh, I see what's happening.

Q We are adding up a little bit more than $5000.

A When Mr. Shevack came into the business, I received a check for $2000 as my commission for his coming into the business. That's how we're goofing this up. That I kept.

THE COURT: Well, would that be then --

THE WITNESS: That would be the $2000 check.

THE COURT: Then would that be additional to what we have been talking about here?

THE WITNESS: I think it's included into what

we have got. You mentioned --

Q No, it's not included, sir.

A You mentioned the $2000 check, did you not?

Q Yes, but you didn't mention it. I mentioned it after you finished elaborating on --

MR. GARMANSKY: Your Honor, counsel is being argumentative. This line of questioning --

THE COURT: I think we'd like to try to wind this up.

MR. GOIDEL: All right.

THE WITNESS: Mr. Goidel, did I not mention $5000?

Q Yes, you did.

A Okay.

Q But you left out figures aggregating more than $5000. A very large substantial sum.

A There is another $2000 now that I am admitting that I earned when Mr. Shevack came into the business.

Q So then that's $72,000? Roughly?

A Which is exactly four times 24,000, three times $24,000.

Q We'll leave this point for the moment.

Did you receive any other form of remuneration?

A Not to my knowledge. Remuneration?

Q Remuneration, pay, salary, compensation, whatever word you would like to use?

A Only petty cash returns.

Q You have an automobile?

A No, I do not.

Q Did you have an automobile at that time?

A Yes, I did.

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(continued next page.)

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1 Lieberman-cross/Goidel

Q Who provided you with the automobile?

A It was leased by Galaxy Foods.

Q Yes, to Galaxy Foods by Appollo, is that the name of the firm?

A No, it's not. I forget the name of it. It's an auto leasing firm in Long Island.

Q Did the corporation extend to you the privilege of using that automobile?

A For some months, yes. Other months I paid for it.

Q And how about -- sir, did you ever hear of a corporation 1866 Corp.?

A Yes.

Q Who is that?

A That was our landlord at 1864 Flatbush Avenue.

Q So that was for rent?

A Yes.

Q What kind of automobile did you drive while you were with Galaxy?

A Cadillac.

THE COURT: Do you think this is really getting us anywhere?

MR. GOIDEL: Again, your Honor, just to show status.

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Q Who were given the privilege of operating corporate automobiles?

A Myself, Mr. Horowitz, Mr. Katz and Mr. Roth. I also drove a Chevrolet.

Q Did Mr. Kirsch, to your knowledge, through 1972, let's say from August of '72 when he first discussed joining your organization -- August 1971 when he first discussed joining your organization, through December of 1972, to your knowledge, have any other position or jobs with any other firm?

A Have any other position or job with any other firm?

Q Yes.

Q Not to my knowledge, no.

THE COURT: Who is this?

MR. GOIDEL: Mr. Kirsch.

THE COURT: Did you say August 1972?

MR. GOIDEL: August '71 through December '72. At first I did say August '72, your Honor, I made an error. I think I corrected it.

Q Did he have any other position with any firm that you know of?

A Not to my knowledge.

Q How many hours a day did MR. Kirsch work?

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A I would say no less than 12 on any given day, and up to 24 on others.

Q How would you describe him, would you describe him as a hardworking, industrious person, as a lazy man or loafer, or what?

A I would describe him as an extremely industrious individual, and one who would be so far afield from the definition of laxy as to never hear it -- as to never hear him described that way.

Q And these hours of working that he performed, were they devoted to any specific activities in behalf of the corporation?

A Definitely.

Q Would you tell us what specific activities he performed for the corporation?

A All those that I outlined before. For instance, the establishment of the catalog, buying of the product -- just listing 3,600 items, determination of which ones out of 10,000 possible we would carry; supervising anywhere toward end of 215 individuals.

Q All of these activities that you are discussing with us now were geared toward the retailing of food, were they not?

A That is correct.

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Q Did Mr. Kirsch ever indicate to you that he did not believe that Galaxy would be in a position to market food?

A Did he ever indicate to me that -- I don't understand the question.

Q Did he believe -- I will put it more positively. To your knowledge, did he believe that this firm intended to market food?

MR. GARMANSKY: Objection, your Honor.

THE COURT: Sustained.

Q Did he ever say to you anything concerning this corporation's intentions to market food; yes or no?

A He did not.

Q Did he ever say anything to you to the effect that he did not believe that this corporation could or would market food?

A He did not.

Q Now, Plaintiff's Exhibit 13A in part reads, and this is apparently a statement submitted to a Mr. Horowitz, and I assume this forms a part of the corporate records and is kept in the normal course of the operation of the corporation's business: "I am going to be working Don Kirsch. My intentions are to take some of the pressure off Don."

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Did Mr. Kirsch work under pressure?

A Oh, yes.

Q Sir, in discussing the executive board, do you recall -- I believe it was yesterday -- it was yesterday -- well, sir, let's see if I can save us some time.

You said that only those officers of the corporation whose title was preceded by the word executive attended the executive board meetings, in addition to the corporate officers, meaning you and the other gentlemen shareholders of the corporation; is that correct?

A That is correct.

Q Is that an accurate statement?

A That is accurate.

Q No one else attended those meetings?

A There might have been --

MR. GARMANSKY: Could we have a time period?

MR. GOIDEL: At anytime.

A There might have been a time when we called in somebody, an external person, perhaps a distributor who might even have a complaint he might to place before us; he'd be invited in.

However, that was on a rare occasion.

Q How about your wharehouse manager, didn't he attend these meetings?

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[illegible] Lie [illegible]/ol.21

A Are you referring [illegible]

Q I have his [illegible] Mr. [illegible], Mr. Martin.

A Only when he became an executive vice president. Perhaps one or two other times when he was [illegible] he was invited in.

Q When did he become a vice president?

A Subsequent to Mr. Kirsch leaving.

Q That would be in '73?

A Yes.

Q But didn't Mr. Martin attend meeting when Mr. Kirsch was present?

A Only as executive vice president of transportation.

Q But he didn't become executive vice president until after Mr. Kirsch left?

A I am not sure of that. No, he was executive vice president of transportation during the pilot program.

Q When was that?

A I believe. That was starting November 27, 1972. I have to refresh my recollection.

Take your time, sir.

A Oh, yes. You are quite correct. He was not appointed to that position until after Mr. Kirsch left,

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since there was nobody handling transportation, because Mr. Rosenbach had passed away, he was called in to sit at those meetings.

Q And that was before Mr. Kirsch left, correct?

A Correct.

Q So that in addition to executive officers, at least Mr. Martin attended, and he was not an executive officer at the time?

A Not all the exeuctive board meetings.

Q How about Mr. Melendez, was he an officer?

A Mr. Melendez became an executive vice president of administration.

Q When?

A When Mr. Celano moved up to first vice president of the executive board.

Q When was that?

A I don't remember. But it was certainly after the Rafi Awards in September of 1972.

Q As a matter of fact, it was after Mr. Kirsch left the employ of Galaxy Foods?

A That is not true.

Q Sir, let us see if we can establish when this book was prepared, this book, Plaintiff's Exhibit 11.

A There were several amendments to this book, but

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the original was prepared -- this book was prepared to Kenneth Rosenthal leaving, I would say August of 1972.

Q Is when that was prepared?

A This book, the one we have here. It has my picture as chairman of the board, Mr. Avni and Mr. Horowitz, so it obviously could not have been prepared prior to Mr. Rosenthal's leaving.

Q Didn't Mr. Melendez attend meetings of the executive board before August of 1972?

A He did not.

Q Never?

A Never.

Q You are certain, sir?

A I am positive.

Q Other than Mr. Martin, can you think of the name of any individual not an executive board member, who attended meetings?

A Susan Singer.

Q Who is Ms. Singer?

A She was the secretary-bookkeeper.

Q Did she regularly attend those meetings?

A No.

Q How frequently?

A About as frequently as Mr. Martin, once or

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twice.

Q You say distributors at times were invited to these meetings, is that correct?

A That's correct.

Q Was Mr. Shevack invited to these meetings?

A No, he was not.

Q You made mention that all of these officers attended the step-up meetings; is that correct?

A That's correct.

Q But did all of the officers speak at step-up meetings?

A No, they did not.

Q Who spoke at the step-up meetings?

A To the best of my knowledge, the only people who spoke at step-up meetings was myself, Mr. Horowitz, Mr. Roth, Mr. Katz; and Mr. Rosenthal in the very beginning -- I think I omitted him on prior testimony -- and perhaps Mr. Glazer on occasion.

Mr. Avni never spoke at it --

THE COURT: I am confused. I thought the answer you gave was the officer's did not speak.

THE WITNESS: No, your Honor. I believe my testimony will read that at step-up meetings it was only an officer or director of the corporation --

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THE COURT: Maybe you misunderstood the question.

BY MR. GOIDEL:

Q My question again, sir, was: Who spoke at the step-up meetings?

A I think I've named those people.

Q You've named all of the people?

A To the best of my knowledge those are all of the people who ever spoke at a step-up meeting.

THE COURT: And these would be all of the officers.

THE WITNESS: All the people I have named were officers, with the possible exception of Mark Glazer, who was not an officer.

Q But not all of the officers spoke at thse meetings?

THE COURT: Let me amend my statement, all the corporate officer --

THE WITNESS: Your Honor --

THE COURT: Except Rosenthal, perhaps.

THE WITNESS: Rosenthal did speak. Mr. Avni, to the best of my recollection, never spoke at a step-up meeting. As a matter of fact, Mr. Avni never spoke at any meeting, perhaps a training session

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in retail.

THE COURT: Was he the only corporate officer who did not speak?

THE WITNESS: He was the only corporate officer who did not speak, so that's three people; Mr. Horowitz, myself and Mr. Rosenthal.

And the non corporate officers, Mr. Katz, Mr. Roth, Mr. Glazer, who was not an officer of any type, and I think that's it.

Katz, Glazer, Roth -- that's it.

Q Sir, I note that Mr. Kirsch's name is not included amongst those who spoke at these step-up meetings.

A That is correct.

Q That is not an oversight?

A That is not an oversight.

Q Did Mr. Shevack speak at those meetings?

A I don't believe Mr. Shevack ever spoke at any meeting, with the exception of the one I mentioned before.

Q Which brings us to the next matter, sir, that meeting at which Mr. Shevack is purported to have spoken.

A That's correct.

Q Were you present?

A At the meeting?

Q Yes.

A No, I was not.

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Q Did the corporation run that meeting?

A It did not.

Q Who ran that meeting?

A It was an association meeting.

I believe I described the association to this Court before.

Q I would like to make it clear as to whether or not the association was an integral part of the corporation and its setup; was it?

A No, not -- it was not.

Q Did the corporation pay the expenses of the association?

A No, it did not.

Q Who paid the expenses of the association?

A The association collected dues from its members, it paid for the meeting rooms that the opportunity meetings were in.

Q It was like a private club or business association?

MR. GARMANSKY: Objection.

MR. GOIDEL: Withdrawn.

(Cont'd on next page.)

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Q But it did not have any formal relationship to the corporation, is that correct?

MR. GARMANSKY: Objection, your Honor. What does Mr. Goidel mean by formal association? Can he please rephrase the question.

Q Sir, would it be a fair statement to make that one had to be a distributor in Galaxy Foods in order to join this association?

A Distributor and or field manager, that is correct.

Q In order to join the association. But not all who were distributors and field managers had to join that association?

A I think it's fair to say they had no requirement that you join.

Q Fine.

THE COURT: Was the association or the existence of such an association provided for in any of the documents that have been marked in evidence here?

THE WITNESS: Yes, your Honor.

THE COURT: Which one?

THE WITNESS: The plaintiff's Exhibit 3, 4, 5 and 6, I believe, on just 4, 5 and 6. All except the white one. On page 6 of Part II of Plaintiff's Exhibit 4 there is a portion saying the Distributor's Associa-

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tion: --

Q Where is that, sir?

A Right here. On page 5 of Part II of Plaintiff's Exhibit 5 there is the -- virtually the same thing as in there.

On page 6 of Part II of the Plaintiff's Exhibit 3 there is virtually the same statement about the distributors association.

Q In other words, it was a notification to whoever read this that there was such a thing as a distributors association?

A That's right.

Q But that is the extent of any activities or any participation which the corporation had vis a vis that association, is that correct?

MR. GARMANSKY: Objection, your Honor. What does Mr. Goidel mean by "extend" -- where is the --

Q Did it finance the association?

THE COURT: So I won't be kept shrouded in mystery here, what does it say?

MR. GOIDEL: I will take any one of them and read it out loud.

THE COURT: Take the earliest one. Are they dated?

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MR. GOIDEL: "The association is a group of distributors and field managers in a given area acting in a voluntary cooperative effort to participate in the sharing of recruiting costs. Suggested procedures for the formation of an association: five or more distributors or field managers in the same general area may form an association for the purpose of providing opportunity meeting locations, an office out of which to conduct business, and/or for the purpose of establishing a fine line of communication between distributors and company.

"Galaxy must be informed in writing about the formation of an association, the proposed members must be identified by listing their names, addresses, status, distributor or field manager, and Social Security number."

Shall I continue?

THE COURT: Is there anything material?

MR. GOIDEL: No, sir.

BY MR. GOIDEL:

Q Who paid for the meeting hall?

A The association.

Q Who paid for any coffee that may have been served there?

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A The association.

Q Did the corporation pick up any expenses of this association?

A Yes, there came a time when the association -- the New York association became broke.

Q When?

A I can't say when, exactly.

Q Would it be after Mr. Kirsch left?

A I think it was before.

Q By the way, at the time that Mr. Kirsch left, was Mr. Shevack a franchise owner or distributor?

A As far as I know, both Mr. Shevack and Mr. Kirsch owned franchises in whatever is left of Galaxy Foods to this day.

Q Is that right? Do you recall Mr. Shevack making arrangements with you personally for the sale of his franchise so that he could withdraw from this corporation?

A I'm sorry, you're right, Mr. Goidel.

Q Tell us about that, would you, please.

A Yes. Mr. Shevack sold his distributorship to Mr. Padilla's mother, I believe it was.

Q Who arranged for the sale?

A Well, they arranged basically for it between the two parties.

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Q Didn't Mr. Shevack have to pay $500 to you in order to arrange that sale so he could withdraw from the business and so that his franchise could be sold?

A No, Mr. Goidel, he did not pay $500 to me.

Q To whom did he pay it then, since we are fencing?

A To Galaxy Foods, Inc. That's not fencing.

Q I see. He paid Galaxy $500 in order to allow him to withdraw and sell his franchise; is that correct?

A It's correct, but not accurate.

Q You correct it then to the extent that it would make it accurate.

THE COURT: That is a fine line of distinction.

THE WITNESS: He paid $500 to Galaxy Foods and what we have always termed transfer fees. Those transfer fees were to arrange for all the papers of all these field managers and distributors that he had in his organization to be transferred and to be re-assigned, and also in the computer amount of the individual, on the sales portion of it, it would have meant that all these people would have had to have been taken off the computer and put back on, stopping the function of everything, and computer time is very expensive.

So we had arranged for this long before the computer came into being, so that there would be no

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hassle over it later.

Q But he did pay the money?

A He did pay the money. But I wanted why he paid it. It sounds like a bribe.

Q Did Mr. Shevack at any time have a conversation with you, advising you as to why it was that he wished to withdraw from the firm or any association with it?

A No, he did not.

Q Did Mr. Shevack at any time cause any orders for food to be forwarded to Galaxy from customers?

A I can't answer that question. I have no knowledge of that.

Q Who would have knowledge of that?

A I don't know now.

Q Would Mr. Kirsch have knowledge of that as being in charge of marketing?

A He was not an order taker.

Q Well, tell me who would have knowledge, are there any corporate records that would indicate such a thing?

A The corporate records, as far as those maintained at the warehouse, to the best of my knowledge, have been disposed of and I could not give you who placed what order.

Q Let me ask you this question, sir, did Mr. Shevack ever advise you that he was entitled to commissions on the

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sale of food and that those commissions were not forthcoming and therefore he wished to withdraw from the business?

A Mr. Shevack left the business in February of 1973. We did not pay commissions until March and April of 1973.

Q Yes, we are aware of when you started paying commissions.

When were you supposed to start paying commissions, was there any limitation set forth in any writing to any franchisee advising them that they would not be paid commissions?

A Of course.

Q Of course?

A Of course.

Q Where?

A We were never supposed to pay commissions on the pilot program.

Q Where did it say that?

A It was said at every single meeting. It was written in letters.

Q At every single meeting of whom?

A Of Galaxy Foods, Inc.

Q Of Galaxy Foods, Inc.?

A That's right.

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Q But you tell me, what meetings of Galaxy Foods, Inc. was Mr. Shevack requested or invited to attend?

A What?

Q I said, what meetings of Galaxy Foods, Inc. was Mr. Shevack invited or requested to attend.

A Let's put it this way --

Q Let's answer my question.

A O.K. Let's start with the opportunity meetings where there was a guest speaker from the company.

Q But you told me that Mr. Shevack did not have to attend those meetings, you just testified on direct examination to that effect.

A He did not have to, but he did attend.

MR. GARMANSKY: Your Honor, the record will speak for itself. Counsel is being argumentative again.

A I suggest he ask the questions over.

Q Mr. Shevack executed an application or a contract for the purchase of a $5,000 franchise, is that correct?

A Of course.

Q And is this the form that he executed? I am now referring to Plaintiff's Exhibit 8.

THE COURT: Is that in evidence?

A That's the form, yes.

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THE COURT: Is that in evidence?

THE WITNESS: Yes, it is.

MR. GOIDEL: It is.

Q Does this speak in terms of the receipt of commissions from the sale and distribution of food?

A Indirectly it does, yes.

Q Does it say anything on that that there is a pilot program during which period of time payments will not be made, commissions will not be paid on the retailing of food?

A Yes.

Q Read it to me, please.

A "Galaxy is a starting company and may never develop to the point whereby distributors may earn profits, salaries and commissions from the sale of such items." In the prior paragraph it says Galaxy is presently not retailing food or other supermarket items.

Q That doesn't say that once they are retailing food that the commissions will not be paid on the retailing of food?

A That's correct, but we were never retailing food.

Q Your pilot program was retailing food, wasn't it, sir?

MR. GARMANSKY: Objection, your Honor.

Q What were you selling?

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MR. GARMANSKY: Objection.

THE COURT: Wait a minute. Let me try to follow. I am going to overrule the objection. This is cross-examination and I think the question is proper.

A Mr. Goidel --

THE COURT: Wait a minute now. Let's hear the question.

(Question read.)

THE COURT: Was it or wasn't it?

THE WITNESS: It was not retailing food. It was look --

THE COURT: Hold it just a minute. You say it was not retailing food?

Q Tell me what it was.

A It was a pilot program testing out the system. During the course of that pilot program we were selling food, yes, but that was not the purpose of the pilot program to pay commissions, it was to test our systems.

Q Sir, I understand that you say you were not going to pay out commissions. But let's take it step by step. The pilot program was the sale of food, is that correct?

A That was part of it. That was a very small part of it.

Q The orders for that food were obtained by the

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distributors, is that correct?

A In a voluntary basis, yes.

Q Naturally, nobody twisted their arm. And the contract that was executed by the various distributors stated that they would receive commissions on the sale of food, isn't that correct?

A Butnot on the pilot program.

Q Please, sir. Isn't that correct?

A No, it is not correct.

THE COURT: There is no use fencing around on this, Mr. Goidel.

MR. GOIDEL: I am not fencing, your Honor. The document will speak for itself.

THE WITNESS: May I see the rules and regulations?

THE COURT: To me it is certainly not improper nor unreasonable to embark upon a test program, and regardless of what you read out of that contract, there certainly is an argument that the retail sale of food as a continuing operation is to be distinguished from a test program.

I agree, I don't know what this witness would say if asked whether this pilot test program was brought to the attention of the distributors --

Was it?

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THE WITNESS: Your Honor, there is a rule and regulation No. 25 which is incorporated into that contract which was there when Mr. Shevack came into the business, which states that Galaxy will not pay on the pilot program. And in the event that it doesn't, he has a right to get his money back six months after the company is retailing, full-scale retail operation. The pilot program was just that, a pilot program.

We never intended to pay commissions on the pilot program, even though we did.

Q Do you remember to whom Mr. Shevack sold his franchise?

A I thought it was to Mr. Padilla's mother.

Q Would that be Rafeala Oporto?

A I don't know.

Q In whose name was that franchise registered?

A I have no idea.

Q Was it registered in your name?

A Oh, you mean originally?

Q At the time of the transfer.

A I think first it was transferred to Mr.Shevack's name then Mr. Shevack transferred to them. When Mr. Shevack -- Mr. Shevack brought his own distributorship, O.K. --

Q Yes.

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A -- then the field managers that he had brought in were transferred to his organization. He had his own distributorship.

Q It is of no import, but just for clarification of the record, would you tell us what this document is (handing to witness)?

A That is somebody transferring -- it's only part of a document. There are other papers that are missing. I really don't know.

Q What does this box mean, Distributor: Arthur Lieberman?

A That's me, the sponsoring of somebody.

Q Mrs. Oporto?

A Yes.

Q Mr. Padilla's mother?

A Possibly. Is that who it is?

Q But this doesn't indicate that it was you who sold to her a franchise, does it?

A I don't know what it indicates.

Q You don't know what it indicates?

A I don't know how these papers are made out.

Q Do you recognize the handwriting?

A It's my handwriting. But I am saying -- it is only my signature, I believe.

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MR.GOIDEL: I will offer this in evidence, your Honor.

MR. GARMANSKY: May I ask the relevancy of offering this?

MR. GOIDEL: If nothing else, it goes to whether or not when this witness speaks he is speaking accurately and candidly before this court.

THE WITNESS: I don't know what that paper is.

MR. GOIDEL: The paper will speak for itself. It says exactly what it is.

THE COURT: Let me see it a minute.

MR. GOIDEL: To me it looks like the transfer of a franchise.

THE WITNESS: That is not a transfer agreement.

MR. GOIDEL: I don't care what you call it.

(Continued on next page.)

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GR:ss
pml
Js BS

THE COURT: Let me see it.

THE WITNESS: That is part of the correct document, and I know what it is, too.

THE COURT: Well, what is it?

THE WITNESS: Your Honor, I was the sponsor of Arthur Shevack. That is part of the -- only part, one of four parts of the transfer of Arthur Shevack's distributorship to the person named in the middle box there. Okay?

But I was the sponsor of Mr. Shevack and I have to approve any transfer as the sponsor, as -- as outlined in the rules and regulations. That is my approval of the transfer of Mr. Shevack's distributorship.

BY MR. GOIDEL:

Q Fine.

A I just couldn't understand. Looked like I was transferring my own distributorship.

Q It' sure did.

THE COURT: Do you want this cluttering up the record?

MR. GOIDEL: Not now, now that there is an explanation, your Honor.

THE COURT: All right. That is settled.

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MR. PADILLA: If I could read that?

THE WITNESS: Exercising the power of recall.

THE COURT: Did you say mother or mother-in-law, Mr. Padilla?

MR. PADILLA: My mother. She uses her maiden name.

THE COURT: Oh.

BY MR. GOIDEL:

Q Now, sir, you were present when Mr. Kirsch testified. Mr. Kirsch testified that but for one lecture, which he made at an opportunity meeting and he believed it to be the very first of such meetings following his entry into the firm, that he did not speak at any other. Is that correct?

A To the best of my knowledge, that is correct.

Q And now you also heard Mr. Kirsch testify that he did speak at meetings known as training sessions; is that correct?

A That is correct.

Q Would you tell us, were you in attendance at those training sessions?

A At some, yes.

Q And at any of those training sessions that you attended, did Mr. Kirsch speak?

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A Yes, he did.

Q Could you tell us what Mr. Kirsch said at the meetings that you attended, what the subject was and to whatever extent possible what was actually said by him?

A Yes. He spoke on marketing. He spoke on how we were going to market the products. He told us -- he spoke on -- about how many products had been decided at the executive board we might want to market, what the catalogue might look like, how often we might have to revise the catalogue. He -- unfortunately, I'm not sure if he was -- yes. He also spoke about what types of products, name brands. He mentioned a few of those.

He gave some of the marketing background that's in this book, as far as the A & P and what their volume is and what the average sale might be expected to be, and that's all.

Q Now, I think you also said that at these meetings, correct me if I am wrong, that cold prospecting --

A Cold canvassing.

Q Cold canvassing was discussed, at these training sessions?

A That's correct.

Q That had to do with the wholesale --

THE COURT: I thought you said gold prospecting.

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Q This had to do -- the cold canvassing had to do with the wholesale end of the business, rather than the retail end of the business; is that correct?

A That's correct.

Q Mr. Kirsch ever speak about cold canvassing?

A I never heard him speak about that, no.

Q Now, Mr. Shevack never spoke at those meetings; did he?

A No, he did not.

Q By the way, are you familiar or were you ever physically present at any time that Mr. Shevack interviewed a prospective franchisee?

A Would you define "interviewed"? I don't know what you mean by "interviewed."

Q Met, is that a better word?

A I think I was once or twice.

Q When?

A When he was in Koscot, perhaps. That's one.

Q We are talking now about Galaxy. How about when he was with Galaxy?

A I don't recall being present when he met any or interviewed, as you've used it, any prospective franchisee.

Q Now, you discussed an incident involving a Mr. McLean?

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A That's correct.

Q Is that correct?

A Yes.

Q You made mention of the fact that Mr. Shevack agreed to pay to Mr. McLean X-number of dollars, a certain sum; is that correct?

A Mr. Shevack paid it to Galaxy Foods. I don't believe he gave it to Mr. McLean.

Q All right. Did Galaxy Foods then -- thereupon wipe off any obligation on its books that Mr. McLean purportedly had to it?

MR. GARMANSKY: Objection, your Honor.

I don't think it's been established that there was an obligation owing to Galaxy from Mr. McLean.

Q All right. Did Mr. McLean owe Galaxy any money for a franchise?

A He did not.

Q So that the moneys paid by Mr. Shevack to Galaxy were for an obligation which he, Mr. Shevack, had personally to Galaxy?

A No, not that he had to Galaxy.

Q That he had to whom?

A To Mr. McLean.

Q Did Galaxy thereupon then pay Mr. McLean those

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funds?

A No. We entered -- the funds were for the purchase of a franchise. We entered him as a franchisee.

Q Okay. Fine.

But after this so-called incident that we heard so much about, did Mr. McLean -- was Mr. Shevack indebted to either Galaxy or Mr. McLean?

A No sir.

Q Did Mr. Shevack resist the payment of these funds?

A No sir.

Q Do you know of any other incidents, because the word "incidents" was used even though we only discussed the single one of Mr. McLean? Are you aware of any other incident or incidents involving Mr. Shevack?

A No sir.

Q How about Mr. Kirsch? Did you ever have any complaints concerning him and his relationship to distributors or distributees or whatever you call them?

A His relationship to distributors? No.

Q I see.

You did have a complaint about Mr. Kirsch submitted to you as an officer of the corporation dealing with his work in relation to the retailing end of the business;

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did younot?

A Yes.

Q Yes. That complaint, at least one complaint, concerned his alleged association with Futurist's Foods; isn't that correct?

A That's correct.

Q And that came about sometime in the latter part of January; isn't that correct?

A That's correct.

Q Isn't it a fact, sir, that Mr. Kirsch submitted his resignation on January 2nd, 1973?

A I believe that's incorrect.

Q That's incorrect? Would you have that resignation? Would it be amongst the corporate books?

A It --

Q Or the records?

A It would be there.

Q It's dated January 12th, effective February 1st, but dated January 12th; isn't that correct?

A The document speaks for itself.

Q Oh, thank you. Very good.

Is this the document that you are referring to?

A This is the document.

MR. GOIDEL: I'll offer this in evidence.

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Your Honor, how long shall I continue?

THE COURT: Well, have you got some time to go?

MR. GOIDEL: Oh, yes.

THE COURT: Then perhaps we had better take a recess, as I say, so I won't violate my obligation to the reporters.

What was that exhibit number now?

MR. GOIDEL: This has not yet been marked, your Honor.

Would you mark it for identification?

THE CLERK: He just showed it to the attorneys, your Honor, if they had any objections to it.

MR. LERNER: No objection.

THE COURT: There is no objection.

THE CLERK: All right. It's a two-page document, handwritten, marked in evidence as defendant's exhibit E.

(So marked.)

THE COURT: This is a good place to break for ten minutes.

(Recess taken.)

THE COURT: You may proceed.

MR. GOIDEL: Thank you, sir.

(Continued next page.)

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9 Lieberman

CROSS-EXAMINATION

BY MR. GOIDEL: (Cont.)

Q Mr. Lieberman, to digress for one moment, or to divert. There was a distributee or distributor, rather, by the name of Beck. Do you recall him?

A Yes, I do.

Q Mr. Beck purchased a franchise. Do you remember approximately when, what month or what part of the year?

A I believe it was February, 1972, the latter part.

Q Do you recall whether Mr. Beck paid for his franchise or distributorship?

A Yes, of course.

Q Do you recall, sir, whether Mr. Beck paid for that by certified check, bank draft, personal check or in what manner?

A Yes. I recall that Mr. Beck paid for his franchise with a personal check.

Q Can you explain the circumstances under which Mr. Beck paid for that franchise by personal check?

A Yes. The company had a rule that anybody coming in had to pay by certified or cashier's check or cash.

The reason for that was we wanted to be able to pay the commissions against it and be sure the check was good.

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10 Lieberman-cross/Goidel

However, we were having a price change in March of 1972. Mr. Beck wanted to get in before the price went from 1,000 to 3,000 -- to $2,000 for a field manager's position.

As a matter of fact, about a week and a half before that I had made Mr. Beck a little bet, if you want to call it, on a dinner, that he would not get in before the price change occurred, and he said to me "I will."

I lost the bet because he gave us a personal check.

At the time I refused the check. I said "We can't take this. We only take certified or cashier's checks."

He said "Well, what's the reason for that," and I explained it to him. I said "Well, first of all, we can't pay commission until the check clears and we'd have to have Mr. Kirsch's permission to do this and, second of all, you would not be able to earn any money by sponsoring anyone in until you were in the business with a check that had cleared."

He said he would be -- even though he had some people who were just about to come into the business -- I even remember one of the fellow's names that he was bringing in. It was a guy who went to Buffalo. Oh, I'm sorry. It slipped my mind, but he was bringing in a full distributor

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who was going -- who became later on somebody from a Buffalo team.

But, in any event, Mr. Beck was extremely co-operative.

Mr. Kirsch I believe was called at the warehouse, told about the situation and it was okayed by Mr. Kirsch and Mr. Beck came in at that time.

Q By making payment by personal check uncertified?

A Yes. If -- this can be verified because I believe we have copies of all the payments coming into the business.

Q To the best of your knowledge, sir, did his check clear the bank in the ordinary course of business?

A Yes, it did.

Q Now, sir, I am going to show you various documents which have already been marked in evidence. First plaintiff's exhibit 3. Did Mr. Kirsch prepare any portion of that brochure?

A He did not.

Q Did Mr. Shevack?

A He did not.

Q Sir, I show you plaintiff's exhibit 5. Did Mr. Kirsch prepare any part of that brochure?

A HE did not.

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Q Did Mr. Shevack?

A He did not.

Q Sir, I show you plaintiff's exhibit 4. Did Mr. Kirsch prepare any part of that document?

A He did not.

Q Did Mr. Shevack?

A He did not.

Q Sir, I show you plaintiff's exhibit 7. That is the ad that appeared in the newspaper. Who prepared the text of that?

A Mr. Katz.

Q Did Mr. Kirsch prepare any part or portion of that?

A He did not.

Q Did Mr. Shevack?

A He did not.

Q Sir, I show you plaintiff's exhibit 12. Did Mr. Kirsch prepare that?

A He did not.

Q Did Mr. Shevack?

A He did not.

Q Sir, did the corporation -- withdraw that.

Sir, the corporation was organized through the services of counsel or an attorney; isn't that correct?

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A That's correct.

Q They at least prepared the certificate of incorporation?

A That's correct.

Q Filed it?

A Yes.

Q Got your corporate books?

A That's correct.

Q Did you thereafter consult or use counsel in the course of day to day operation of your business?

A Yes, we did.

Q Sir, didyou ever inquire of counsel as to whether the activities which your corporation was pursuing, as to whether it was legal?

MR. GARMANSKY: Your Honor, I object to that question.

MR. GOIDEL: Your Honor, this goes to the question of intent.

MR. GARMANSKY: May we have the question read back, please.

THE COURT: Read back the question.

(Record read.)

THE COURT: I will allow it.

MR. LERNER: Specify which activities.

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MR. GOIDEL: I will. Let him answer that and I'll take it step by step.

MR. GARMANSKY: It's kind of a broad question as it now stands. Please specify in the question first.

MR. GOIDEL: Fine.

(Continued on next page.)

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GR:GA
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BY MR. GOIDEL:

Q Sir, did you ever inquire of counsel as to whether the activities of your firm were in violation of any Federal statute?

A Yes, we did.

Q What was the opinion rendered?

A That we are not in violation of any Federal statute.

MR. GARMANSKY: Time period?

Q When was that request for information or advice made?

A Well, it was always made, as far as the preparation of these -- these pamphlets that you've shown me here, and also prior to the printing up of this ad, but it was specifically made as part of an audit conducted, I believe in May of 1973, subsequent to the start of the Securities and Exchange Commission's investigations of Galaxy Foods.

Q But you say earlier, and as these various documents were being prepared, consultation was had with counsel?

A That is correct.

Q Did you communicate this fact to the Executive Board?

A I believe we did.

Q Did you -- Well, tell us what you said to the Executive Board as relates to the activities of the corporation,

vis-a-vis the information you received from counsel?

A Well, at Executive Board meetings, we would say we have the -- the Field Operations has prepared a draft of the new manual. The manual -- This draft has already been approved by Mr. Rozan, who was the attorney at that time, and should be in print and should be out to distributors soon, whenever we expected, whatever time it was.

With respect to this ad, when the -- the final draft was made of the ad, the one that I've testified that was presented to the Executive Board, that draft had already been approved by counsel, Ralph Rozan, and we had already -- when we told everybody at the meeting that that was the case.

Q Fine. Now, sir, when you made this communication concerning the advice of counsel on the different occasions to the Executive Board, do you recall whether Mr. Kirsch was present?

A I would imagine he was present at those meetings, but I cannot testify that he definitely was.

But, as I say, there are very few meetings that Mr. Kirsch missed. Even though he was working over in the warehouse, he came over during Executive Board meetings.

Q Now, sir, as relates to what was being said at Opportunity meetings, did you ever request advice from counsel as to whether what was being said there was in violation of any

Federal law?

A Well, yes. All the things that were being said at the Opportunity meetings were in these -- in these documents that we've alluded to before, Plaintiff's Exhibits 5, 3, 6 and 4, and these documents were cleared in toto by the attorney.

Q Now, Galaxy Foods subsequently had a proceeding against it by the Securities & Exchange Commission?

A That is correct.

Q That is the action that we are participating in here today; is that correct?

A That's correct.

Q Did any other Government Agency investigate the activities of Galaxy Food, and if so, when?

A Yes. The Attorney General's office investigated Galaxy Foods, or were investigating for a short amount of time. I can't give you the dates on that. I don't recall them.

THE COURT: I assume you mean the New York Attorney General?

THE WITNESS: Yes, your Honor.

Q What years?

A 1972, latter part, I believe. The --

Q And did you, in connection with that investigation, ever receive an advice from the Office of the Attorney General, ordering you to cease and desist certain activities?

MR. GARMANSKY: Objection, your Honor. Where is the relevancy of this line of questioning?

MR. GOIDEL: The relevancy, sir, goes to the question of intent, as to whether or not my clients, in particular, since I am only concerned with them, had any reason to believe that they were doing anything illegal, or, rather, to the contrary, they had been reassured that what they were doing was legal.

MR. GARMANSKY: Your Honor, intent is not an issue in this case, as we discussed earlier in our legal theory of law.

MR. GOIDEL: Intent will certainly go to any question with regard to disgorgement.

MR. GARMANSKY: There are many cases, your Honor, holding that whether or not a person knows if he's selling a security or not, he can be enjoined.

MR. GOIDEL: I said, it certainly goes --

MR. GARMANSKY: You don't have to know.

MR. GOIDEL: I'm sorry, I said, it certainly goes to the question of disgorgement, and whether or not a man who worked a year and a half of his life and took a salary has to repay that salary to somebody, whether he was acting in good faith or bad faith.

THE COURT: I think it might be material to the

question of relief, if not beyond that, so I will let him state whatever he was going to state here. I am assuming there must be something.

Q Did the Attorney General --

THE COURT: Which eminated from the Attorney General's office? Was there something from the Attorney Gereral's office?

THE WITNESS: Yes. We received notification that they had received a complaint about us from a franchisee, and we cleared up that complaint. As a matter of fact, it resulted, I believe, in the refund of the franchise fee to that individual, and that was all we ever heard from the Attorney General's office.

Q Sir, do you recall what month or what period?

A I think it was the latter part of '72. I couldn't give you a specific time.

Q Now, did any other Governmental Agency, be it local, that is, City, State or Federal, cause an investigation to be conducted of your organization prior to January of 1973?

A Yes. There were two others.

Q Would you tell us about them?

A One was the -- the District Attorney of Brooklyn notified us that they were conducting an investigation pursuant to the activities of certain franchisees about questionable

methods of obtaining bank loans. They named one particular franchisee, who I don't -- I'm not going to state his name right now, unless it's demanded. I don't think it's necessary, because as far as I know, that action was completely dropped and forgotten.

However, we were in contact with the District Attorney's office at that time.

The other one, of course, is an action which is -- was filed in September of 1973 against Galaxy Foods and nine other individuals. I believe Mr. Kirsch is included in that action, and I know I am, and Mr. Hurwitz, for fraud and deceptive -- whatever it may be. I'm not sure exactly, but by the Department of Consumer Affairs.

Q But Mr. Kirsch is not a party to that proceeding?

A Okay.

Q Does that refresh your recollection? I'm asking the question.

A I stand corrected.

THE COURT: That is the New York City Department of -- is it?

THE WITNESS: That's correct, your Honor.

THE COURT: You say it is an action?

THE WITNESS: That's right.

THE COURT: In a court?

THE WITNESS: In the State Supreme Court, Manhattan.

Q Sir, to clear up the record, if I refresh your recollection that Mr. Kirsch is not a named defendant in that proceeding, does that refresh your recollection?

A That's correct.

Q Thank you.

THE COURT: Is Shevack?

Q Nor is Mr. Shevack?

THE WITNESS: No, your Honor, he's not.

THE COURT: What was the date? Did you give a date on that?

THE WITNESS: I believe it was September 29, 1973, that that action was started.

Q Now, sir, unfortunately I've been requested, and I will ask you as a consequence, what is the name of the individual who was inquired about by the Office of the District Attorney, Kings County?

A Robert Coady, C-o-a-d-y.

MR. GOIDEL: Excuse me one second.

THE COURT: Did you refer to him as a prospective franchisee, or an actual franchisee?

THE WITNESS: He was a present franchisee, with Galaxy Foods.

What happened, your Honor, was, the District Attorney sent some Investigators into our warehouse when Mr. Coady was there. They took him and a briefcase which he had with him, down to the office of the District Attorney. They questioned him, and then they released him.

We subsequently questioned Mr. Coady, too, to find out if there was anything in his actions, or in the opinion of the District Attorney's office, to find out whether there was anything that we might have to respond to, but he said no, and that was the last we ever heard of it.

MR. GOIDEL: May I continue, your Honor?

THE COURT: Yes.

BY MR. GOIDEL:

Q What is the status, sir, of the Consumer Affairs action?

MR. GARMANSKY: Your Honor, that calls for a legal conclusion on the part of a witness.

THE WITNESS: Your Honor, I represent myself in that case, so I'm in a position to give that opinion. It has been removed from the calendar part and placed in -- taken out of -- is in a Special Term right now. Still in Motions stage.

MR. GUSRAE: They've done nothing.

THE WITNESS: It's just pending, your HOnor.

Q What was your answer?

A I said, it's just pending. It's been removed from Calendar Part and is now in Special Term.

MR. GOIDEL: Your Honor, may I inquire as to how long I should continue, because I have various other areas that I could begin to go into.

THE COURT: Well, let me ask you this. What are the prospects here with respect to further proceedings?

Normally, I have fairly heavy calendar motions and other things on Friday, and I would not plan to continue evidence on Friday, unless there was the prospect of finishing it up.

MR. GARMANSKY: By this Friday, your Honor?

THE COURT: Yes.

MR. GARMANSKY: No, no prospect.

THE COURT: That is all I want to know.

In that case, then, I suppose we might as well recess now until tomorrow morning.

MR. GOIDEL: Fine. 10:00 o'clock, your Honor?

THE COURT: Right.

MR. GOIDEL: Thank you, sir.

(Whereupon, a recess was taken until October 3, 1974, at 10:00 o'clock A.M.)

* * *

I N D E X

Witnesses	Direct	Cross
Arthur Lieberman	352	433

Exhibits

Plaintiff's		For Id.	In Ev.
12	Pgs 1&2 of 6-pg Document	375	382
12-A	Pgs 3-6 of 6-pg Document	383	391
13,13-A,B,C	Documents		434
13,13-A	Documents	425	
13-B, 13-C	Documents	426	

Defendant's			
D	5-pg Document	436	
E	2-pg Document		529

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

SECURITIES EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 73-C-1742

GALAXY FOODS, et al., :

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

October 3, 1974
10:00 o'clock A.M.

B e f o r e :

HONORABLE EDWARD R. NEAHER, U.S.D.J.

BURTON SULZER
OFFICIAL COURT REPORTER

Appearances:

ALLAN LEPNER, ESQ.
HARRY GARMANSKY, ESQ.
REGINA MYSLIWIEC, ESQ.
JULIA WILLIAMS, ESQ.
Attorneys for SEC

ALVIN GOIDEL, ESQ.
Attorney for Defendants Arthur Shevack
and Irvin Kirschenblatt

BERT GUSRAE, ESQ.
Attorney for Defendants Avni, Horowitz, Glazer
Lieberman & Katz
225 Broadway
New York, New York

GEORGE PADILLA
Pro Se

THE COURT: Are you all ready?

MR. GARMANSKY: Yes, your Honor.

THE COURT: You may resume the stand, Mr. Lieberman.

A R T H U R L I E B E R M A N , called as a witness, having been previously sworn by the Clerk of the Court, resumed the stand and testified further as follows:

CROSS-EXAMINATION

BY MR. GOIDEL (Cont'd):

Q Mr. Lieberman, will you tell us, please, when you and the other incorporators first sat down to discuss the formation of Galaxy Foods?

A I believe it was in June or July of 1971.

Q Who sat down and where was the discussion had?

A Basically I believe it was in two places on sepate occasions. We either used Top Enterprises, that was a boutique that myself, Mr. Avni, Mr. Rosenthal and a few other people owned, and my home.

Q And who participated in those pre-incorporation meetings?

A Mr. Avni, myself, Mr. Rosenbach and Mr. Rosenthal, at that particular time. There was one other pre-incorporation meeting that I can recall that was held

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at the YMCA in August of 1971, and the 11 people who I mentioned before were to be offered the franchise -- I believe there were 22 there -- that we to be offered the franchises on a work-in basis were also there, and we discussed marketing plans and general plans of salary.

Q Concerning this working basis, much has been said by you with regard to the arrangement that had been made between you and Mr. Shevack for him to sort of earn a franchise; is that correct?

A That's correct.

Q He did earn a franchise?

A Oh, yes.

Q How long a period of time did it take him to work and realize a franchise?

A I think about two or three months.

Q How many people did Mr. Shevack sell franchises to?

A You mean to work in?

Q Just.

A I don't recall. I think it was five or six.

Q Tell us what was discussed at this re-incorporation meeting?

A Well, first of all, of course, we knew immediately that we would need personnel with much more knowledge in

various fields than we had, so out of the list of 22 people that we had, we already knew background on a lot of people, and we decided what position might -- they might be able to fill after we went forward.

For instance, Mr. Celano had background, he worked for J. C. Penney's in the computer end of their business, I believe he was a computer programmer for J. C. Penney, and we knew that computers would have to tie into this type of operation, so we decided that he might --

Q Computers would have to tie into this type of operation?

A Definitely.

Q For the sale of franchises?

A No, no. For the sale of food.

Q Okay.

A We were going to use it also for the sale of franchises, but mainly it was there for inventory, for accounts payable, accounts receivable and for the actual order placing.

Mr. Kirsch, as I said, we knew he had some supermarket background -- I believe he worked for Key Food -- this is just a remembrance, I'm not definitely sure, I believe he was in purchasing with Key Food, and we knew that he had some sort of experience there.

Mr. Rosenbach had worked in transportation in the army and he was an excellent mechanic. He could fix trucks, things like that.

Our sales department, also we knew people who had experience in sales so we assigned those people there.

Then we had to figure out many things -- this particular type of system had been tried before unsuccessfully. We wanted to find out why they were unsuccessful and make sure that we didn't make the same mistakes. So that required a great deal of research not only in the supermarket industry, but in the mechanics of the business, what type of shelving to use, delivery times, things like that.

There was an endless amount of information that we had to require.

Q Was all of this discuss during these pre-incorporation meetings?

A Yes.

Q There came a time when you did in fact incorporate?

A That's correct.

Q When did you first obtain an office out of which to work?

A I believe it was in October of 1971.

Q Where was that office located, sir?

A 1964 Flatbush Avenue.

Q Now, would you describe the office for me?

A I don't know if I understand the question.

Q The layout of the office.

A All right. We had taken an office which was in effect one big room. It was about 25 feet wide by 130, 140 feet long.

We subdivided it with partitions and we made sub-offices out of it.

Q In other words, what we would call private rooms?

A Well, there was no doors on any of these rooms, there was no purpose to having doors. there.

Q Were different people assigned different rooms to work in?

A Yes.

Q Did you have an office?

A Yes, I did.

Q What we would call a private office, that is, an office where you had a deskand you kept your materials in your desk?

A Yes.

Q Who else had a private office?

A Mr. Avni, Mr. Rosenthal, field operations --

that was the sale of franchises, and there was one other office that was used by the rest of the people, it wasn't very big.

Q By the "rest of the people," does that include Mr. Kirsch?

A Yes, it does.

Q He didn't have a private office?

A No, he didn't.

Q Now, sir, noticing your outline of Galaxy Foods, as described in Plaintiff's Exhibit 11, which is in evidence, the hierarchy of Galaxy Goods, that various individuals were placed in charge of various -- let's call it departments of your corporation?

A That's correct.

Q Who was in charge of the distributors?

A Well, according to this particular chart, Steven Roth was in charge of field operations, which was the sale of franchises, and at that point was distributors. But later on we established something called distributor relations, which was just an on-going communication link between the distributors and the company.

Q And who, sir, was in charge of that?

A That was an individual named Marcus Davis.

Q Did Mr. Davis have any title?

A He was director of distributor relations.

Q Did he attend any executive board meetings?

A I believe he attended one when the situation came up and he wanted the executive board, that we invited him in.

Q Who was in charge of Mr. Davis?

A He reported directly to the president of the executive board.

Q That would be who, sir?

A At this time it would have been Mr. Katz.

Q Now, sir, how many franchises were sold by Galaxy?

A To the best of my knowledge, we sold 803 of them before the demise of Galaxy.

(Mr. Padilla entered the courtroom.)

Q Of those 803 franchises, how many of those franchises in turn sold franchises?

A I'm afraid that would be speculation. I can give you my best estimate.

Q If you please.

MR. GARBARINI: Objection, your honor.

THE COURT: The question confuses me. Wasn't 803 the overall total?

THE WITNESS: That's correct, your honor.

MR. GOIDEL: Yes. I want to know how many of those people in turn sold --

THE COURT: 803 franchises, I presume, represents franchises sold by the people you speak of. It's an overall total.

MR. GOIDEL: It is the overall total, your Honor --

THE COURT: That's what the witness says.

MR. GOIDEL: -- but perhaps 100 of those people in turn brought someone in.

THE COURT: It is a very ambiguous approach.

MR. GOIDEL: I don't know how else to phrase it. Let me think.

BY MR. GOIDEL:

Q How many different people sold franchises?

MR. GARMANSKY: Objection, your Honor. Does how many different people mean including field managers and distributors?

MR. GOIDEL: That's right.

THE COURT: That's the aim of the question. I don't know whether the witness is in a position to offer that.

MR. GARMANSKY: Can we have an offer of proof here? Somewhatif it is --

MR. GOIDEL: It would be contained in the books, and it would require us going through it and checking off hundreds and hundreds of items.

I'm trying to save time and perhaps he has an estimate. I will offer the entire record in evidence because it will show that there were commissions paid on the sale of those franchises and from counting up that we would know how many different people received monies for the sale of franchises.

I'm trying to avoid having to go through it page by page by page.

MR. GARMANSKY: Can we ask the relevancy of this, your Honor, if 500 people sold it or 200 did?

MR. GOIDEL I'd be happy to explain.

THE COURT: Perhaps we will all await that explanation with some interest.

MR. GOIDEL: Your Honor, my two clients have been made party defendants in this proceeding.

THE COURT: Yes.

MR. GOIDEL: I really question why. I don't know that they have done anything improper, and certainly we are going to find out here whether they did, but we do know that there were 700, 800 initial people in there and of those 800 people there

were approximately 180, 190 that sold franchises. Certainly they haven't been made part, defendants to this proceeding and I may very well want to go into their activities to demonstrate that my clients didn't even perform as they perrormed and yet they are not defendants.

THE COURT: Is a law enforcement agency of the Government obliged to bring everybody in to a suit designed to carry out the enforcement responsibilities?

MR. GOIDEL: No, sir, but I believe it is incumbent upon that agency to bring, if there is wrongdoing being committed, to bring those primarily responsible in the commission of that wrongdoing into the proceeding.

Otherwise I cannot understand how they can claim that they are bringing the action for the purpose of protecting the public, and it is my purpose to show that there were people not made parties to this proceeding who realized very horrendous amounts of money who were available for prosecution, who were not made parties, who will not be called as witnesses, etc., and certainly if nothing else, if nothing else, it certain would go to the question

of disgorgement, as to whether or not my clients should be financially penalized in light of this entire situation.

MR. GARMANSKY: Your Honor, I believe that Mr. Goidel is trying to shift the issues from his clients to other individuals.

Now, I don't know whether or not Mr. Goidel is going to bring people in who he feels should have been named in this action, that may very well be, but his clients were named for the specific allegations in our complaint.

Now, by having other people come in and saying, or having evidence that they did similar things or committed acts that the defendants did is not, you know, proceeding with this trial. It's not helping the trial move along. It's in the public interests. If we find that his clients, the defendants, did the acts in this complaint, to enjoin them is in the public interest.

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MR. GOIDEL: Your Honor, this is a court of equity. Certainly in considering questions of damages, penalty, disgorgement, this becomes very, very important.

THE COURT: Let me say this, there might be some cogency -- I'm not talking about merit -- some cogency to your point insofar as the defendant Shevack is concerned.

Your other client, Mr. Kirsch, is described as an officer and director -- I'm not altogether sure that's accurate in light of the evidence that we have heard -- but he certainly appears to have been considered an executive, whether you call him an executive officer or not, he certainly was an executive, and there would be good reason for bringing him in on that basis.

MR. GOIDEL: Yes, sir.

THE COURT: Shevack is in perhaps a somewhat different catagory because he's simply named as a distributor and then to that extent your argument that there were other distributors --

MR. GOIDEL: Mr. Padilla as well, your Honor, if I may interject that.

THE COURT: Yes, Padilla and Shevack, yes.

Well, I think my own feeling would be that on a matter which ought to be of record, the more reliable facts would be derived from some statement compiled from the records rather than this witness' recollection, unless the witness is prepared to say that he has this information at his fingertips.

I will take it insofar as it may apply to Messrs. Padilla and Shevack, with a view to getting a broad picture, or as broad a picture as possible, of the circumstances attending the activities of distributors.

I know we have heard some evidence about Mr. Padilla's activities which -- and som too, about Shevack's activities. I realize that he may be regarded by the Commission as having a special role because of his activities in the association, and Padilla, because of his special activities in connection with meetings and a segment of the community.

Are you in a position to indicate who accounted for most of the 803 franchises?

THE WITNESS: I'd only have to give it on my best estimation, your Honor. I don't recall the names or the amount of people, but it would have to be a best estimation, that's the only thing I can

do.

THE COURT: Are you in a position to indicate how many franchises the officer as a group accounted for of the 803?

THE WITNESS: Yes, sir, your Honor, I believe I could do that.

THE COURT: Maybe we can start from there.

MR. GOIDEL: Fine.

CROSS-EXAMINATION

BY MR. GOIDEL: (Cont.)

Q Sirk of the -- let me ask you this question first: Each of the shareholders, sir, did they each own a franchise?

A Yes, they did.

Q How many franchises were sold by those officers, that is, the shareholders?

THE COURT: The shareholder officers.

Q Yes.

A Mr. Avni didn't sell any. I sold only those that Mr. Shevack sold prior to his coming into the business, they were transferred to him, so technically I didn't sell any myself. Mr. Rosenthal sold, I believe, two.

Q Now, all of the other officers of the

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corporation who were non-shareholders, how many did they sell?

A All right. Mr. Horowitz sold two. Mr. Katz sold two. Mr. Roth sold approximately five. Mr. Rosenback didn't sell any. Mr. Kirsch testified, I believe, he sold three.

Mr. Celano sold two. Mr. Quack sold 22. Mr. Marinaccio sold approximately five.

Q Now, in addition to the officers, that is both classes of officers, shareholder and non-shareholder officers, in addition to that others sold franchises; isn't that correct?

A That's correct.

Q And those others were themselves franchisees or distributors, were they not?

A Yes.

Q They had to have been.

A Yes.

Q And how many additional people, that is, how many distributors sold franchises?

THE COURT: You are making a distinction between distributors and field managers?

MR. GOIDEL: Yes, sir.

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THE COURT: But the 803 franchises, does that include both catagories?

MR. GOIDEL: It does.

MR. GARMANSKY: Your Honor, I think we first have to establish how many distributors there were out of the 803, if it's possible.

MR. GOIDEL: Fine.

BY MR. GOIDEL:

Q Do you know approximately how many distributors there were, sir?

A Again, it would be best information estimation.

Q Yes.

A I would say 200 out of 803.

Q Fine.

And of those 200 --

THE COURT: 200 were what?

THE WITNESS: Were distributors, the higher position.

Q And the rest would be field managers; is that correct?

A Thatwould be in my best estimation.

Q Of the 200 distributors, how many of them sold franchises?

A I would say approximately 50 percent, or a hundred.

Q And of that 100, approximately, how many sales did they account for?

MR. GARMANSKY: Objection, your Honor.

What do you mean by "sale"?

Q Sales of franchises.

MR. GARMANSKY: A dollar figure?

MR. GOIDEL: Number of others that they brought in.

THE COURT: We are talking about 200 estimated distributors.

MR. GOIDEL: Yes.

THE COURT: Who sold about a hundred franchises.

MR. GOIDEL: No.

Of those 200 distributors, 100 of them sold franchises, if I understand his testimony.

THE COURT: Then, I misunderstood it. All right. 100 distributors sold about how many franchises?

MR. GARMANSKY: I am going to object to this line of testimony. It's very, very speculative.

We are now splitting hairs, and I think that it's really taxing the witness' memory here. This is really, really speculative here, your Honor.

MR. GOIDEL: Your Honor, I will concede that to a certain extent it is speculative, that is, it may be 210 rather than 200, but we are trying to give your Honor a picture of an operation.

I could have him take every page of this book, go through it one page at a time, and we get a very accurate count. I'm trying to avoid that because that could take a day in itself.

MR. GARMANSKY: What is the relevancy, your Honor? We still come back to that main question, how does this effect Mr. Goidel's clients? If a hundred brought ten people in or ten brought 200 people in, your Honor, --

THE COURT: I would say this, in the interest of not spending too much time and discussion about something statistical of this nature, that if you consider it of importance to your case, I'll give you an opportunity toprepare a schedule which sets forth these statistics, which you will give a -- a copy of which you will give to the Commission and anybody else who wants it, so that they can satisfy

themselves that it's accurate and you may include that exhibit as part of the evidence in the record.

MR. GOIDEL: Fine. Then I only have one or two other questions in this area which don't deal with it.

BY MR. GOIDEL:

Q Sir, could you name for us, to the best of your ability, the ten top salesmen of franchises, that is, be they distributors, field managers or --

A I can do that as of September of 1972, because awards were presented to the ten top salesmen of franchises at a banquet held in September of 1972.

Q Would you then, to the best of your ability, set forth their names?

A They were George Padilla, Alicia Gunning, Ralph Martin, Walter Martin, Franz Quack -- I have these notes somewhere and I wasn't prepared with them.

Can I consult with one of the other defendants?

Q No, sir.

A I cannot? Because I want accurate testimony.

Q You've named five so far.

A I know that Ralph Stewart, but that was subsequent to September '72, but Ralph Stewart was high on the list.

Edgar Mendez was high on the list.

THE COURT: Is this within the same time period, September 1st --

MR. GARMANSKY: No? Your Honor, I object and move to have those last two names stricken from the record because they were not as of September --

BY MR. GOIDEL:

Q THey were not given an award at that dinner?

A No, they were not.

Q Those were --

MR. GARMANSKY: Wait a second, Mr. Goidel, I have an objection.

THE COURT: I will omit those from this present list.

THE WITNESS: I'm sorry, I can't recall all ten.

BY MR. GOIDEL:

Q Let me ask you a much more significant question, I think: Was Mr. Shevack one of those individuals?

A He was not.

Q Did there come a time that Mr. Melendez did achieve a status of being one of the top ten salesmen?

A Ernesto Melendez, Ernie --

Q Did I use the wrong name, did you say Melendez

or Mendez?

A Mendez.

Q Did Mr. Mendez at some point become one of the top ten salesmen?

MR. GARMANSKY: Can we have a time period, your Honor?

THE COURT: Is it Edgar?

THE WITNESS: Edgar Mendez, yes.

A By the way, thank you, because you reminded me of a sixth individual in 1972.

THE COURT: Who is that?

THE WITNESS: That was Ernie Melendez, Ernesto is, I believe, his full name.

BY MR. GOIDEL:

Q Was Mr. Shevack ever one of the top salesmen of franchises?

A No.

Q Was Mr. Kirsch?

A No.

Q Now, sir, I show you a document and ask you if you have ever seen that before?

A Yes, I have.

Q Would you tell us what that is, sir?

A It's a questionnaire from Bruce Katz, president of the executive board, to all distributors and field managers asking their opinion on certain procedures of Galaxy Foods.

Q How often were questionnaires of this type sent out to the distributors?

A I believe they were only sent out twice.

Q Can you tell us the purpose of this particular questionnaire that you have before you?

A Yes. To find out what the distributors felt about policies and procedures that Galaxy would be using.

Q Specifically, didn't this questionnaire, sir, deal with the question of the reduction of the number of franchises?

A Yes, it did.

Q In other words, was there contemplated a reduction in the number of franchises that would be sold?

A Yes, there was.

MR. GARMANSKY: Could we have a time period on this?

MR. GOIDEL: Yes.

Q When was this sent out, sir?

A This was never sent out.

Q It was never sent out?

A It was never sent out.

Q Was it ever handed out?

A That's correct.

Q Oh, it was handed out.

All right. When was it handed out?

A It was handed outi in October of 1972.

Q And to whom was it handed out?

A All distributors and field managers that were at the meeting.

Q Now, sir, I show you all of these other pages and ask you, are they copies that were also handed out and then returned to you or to Mr. Katz, completed by the distributors?

A Yes, they are.

MR. GOIDEL: Your Honor, I offer these in evidence.

THE COURT: Let's have it marked for identification.

THE CLERK: Various documents marked for identification as Defendant Kirschenblatt P.

(So marked.)

THE COURT: You offered them in evidence?

MR. GOIDEL: Yes, I did.

MR. GARMANSKY: I just want to look at them.

MR. GARMANSKY: Your Honor, could I ask Mr. Goidel the relevancy of this questionaire about reducing the number of franchises to be sold or the delivery hours?

THE COURT: That's a fair question.

MR. GOIDEL: Okay.

Your Honor, all of the cases that have been cited by the Securities and Exchange Commission, to my knowledge, indicate that the courts have held that as long as the retail -- so called retail and other business can be separated very easily from the wholesale end of the business and they are not well separated, let's leave it at that, and that the courts will pass upon one issue. That is, the question of security and the intent of the parties to make it a security.

On the other hand, the courts have held in a recent case, a Fifth Circuit case, which was given to me by Mr. Garmansky, that if they are so tied together, that it would appear that the prime purpose of the bills, not merely to sell franchises -- that is, to mark it quote, a security, close quote, and if the main purpose of the business was really to mark it to food-- and these people would

have to work with it -- would have to work to earn monies, that the Howie opinion would be appropriate rather than the other cases that have been cited. That is, the people would be working. They would not be solely related to the activities of the principals in determining whether or not they would earn monies.

Now, here we have an instance where the number of franchises is being reduced, which certainly is most suspect, the contention of the Securities and Exchange commission, that the people really just wanted to sell franchises, and never wanted to market foods or to allow these people to earn money from the sale of food.

MR. GARMANSKY: Your Honor, Mr. Goidel said that this was evidence in reduction of the number of franchises, this was simply a questionaire sent to people to get their views to solicit their responses to this.

Number 1, the reduction of franchises, so far as I know, was never made.

MR. GOIDEL: We will go into that.

MR. GARMANSKY: Second of all, I believe Mr. Goidel, if he did read the Fifth Circuit decision

in Roscot, I believe misstated the exact holding.

MR. GOIDEL: Your Honor, I am not pretending to state the entire holding of the case. We certainly will submit a brief to explain our position vis a vis the case. But I think there is much merit in what I have to say in determining whether or not the Howie opinion should be utilized in connection with this action, or whether one of the other cases which have somewhat modified, perhaps, -- and I don't know -- I don't even think we can call it a modification because the other cases really say, we look at the facts of each case to determine which is applicable in that manner or not.

Now, we are contending, and we have always maintained in our original papers before your Honor, when we made the motion to dismiss for lack of jurisdiction on the grounds that there was no security interest involved here. And I think your Honor appropriately ruled, well, let's hold that off until the end of the trial and we will listen to the merits of the case.

I think what we said all along was, that they were primarily interested in marketing foods.

Now, if nothing else, certainly it goes to

the question of the intent of my two clients in marketing the franchise or selling the franchise or getting an application filled out for a franchise as to whether or not they really believe that this business was going to stay in business, was going to market foods, and was going to allow them to obtain an income and earnings from the sale and processing of food. Very important.

Certainly, if nothing else -- I don't say that it is nothing else -- but if, on nothing else, than certainly the question of intent.

MR. GARMANSKY: Your Honor, this is all irrelevant to the food distribution or the attempt at the food distribution.

We have alleged the offer and sale of the security. The Supreme Court decision in United Benefit holds that you can split a contract, bifurcate it into separate promises. Galaxy was marketing those --

MR. GOIDEL: Your Honor, I --

MR. GARMANSKY: Wait a minute. Please let me finish, Mr. Goidel.

MR. GOIDEL: I am sorry, you are right. I apologize, Mr. Garmansky.

MR. GARMANSKY: Galaxy was making the separate promises. You can earn money wholesale by recruiting people in and you can earn it in the retail by getting customers and selling the food.

Now, what Mr. Goidel is saying, is that there was an intention here to set up a food program. That may very well be. But the fact is that we are here to decide whether or not his client violated the Federal securities laws in offering for sale and selling securities, and in connection therewith, using fraudulent means, devious transactions.

I don't see how this document soliciting inquiries under reduction of franchises or keeping delivery hours open has any merit or relevance to this case.

MR. GOIDEL: Your Honor, I think Mr. Garmansky, in his own --

THE COURT: Let me see one of them.

MR. GOIDEL: Surely.

I think Mr. Garmansky, in his own statement, has indicated what he must show in order to hold my clients liable. He says that they will take the wholesale end of the business and treat it separate and apart from the retail end of the business, and

that in so separating the two aspects of the business, there has been a violation of the securities act

And we are saying at this time, no, sir, you don't separate this. You may have separated it in Koscot and you may have separated it in other cases, but here, the retail end of the business went hand in hand with the wholesale end of the business.

As a matter of fact, these very documents would even indicate another important fact, and that is that there was a limitation on the number of franchises that could be sold in the very first instance.

So that somewhere or another, it had to run out. The right to sell had to elapse. By contract, it had to elapse. And ultimately, the retail end of the business would have to be the main portion of the operation of Galaxy Foods.

MR. GARMANSKY: Your Honor, the significance of 1079 is not important. It could be four thousand. Even if it was open ended, it had to close at some point in time. Just so many people in the world. It had to close anyway. So no matter whether it's one number or a higher number, that is irrelevant. It had to close.

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MR. GOIDEL: No. There are a lot of Chinese. I mean they may have gone to Hong Kong and started selling.

MR. GARMANSKY: Your Honor, there was no retail at all from September of 1971 to the end of November, 1972 in Galaxy Foods. Over a year. The retail was only a limited pilot program. It lasted for about 5 months on a very small scale. Then it stopped at the end of April and it never started up again from May until approximately September of 1973.

So for over three years, Galaxy was in existence that small pilot program on that limited scale was maybe 4 to 5 months. That is all.

MR. GOIDEL: Your Honor --

I am sorry.

MR. GARMANSKY: Will you please wait?

MR. GOIDEL: I am sorry.

MR. GARMANSKY: Mr. Goidel is right in saying the Ninth Circuit and the Fifth Circuit holds you may bifurcate that contract if there is an offer and sale of a security.

Your Honor, some cases hold that the whole franchise can be a security. That is not what we have

alleged here. We have only alleged that the recruitment of individuals and the promise that you can earn money from the efforts of the Galaxy management -- that is, the security. We have not alleged that the whole franchise is a security here.

They may have had a retail program. They may not. That all goes to the question of whether or not they were offering for sale and selling a security here.

We have not alleged that the whole thing is a security. Mr. Goidel, I believe, is just clouding the issue by trying to bring the retail program and fitting it in to the wholesale aspect and saying, but they did have a retail program. Therefore, it's not a security.

We have never alleged that the entire franchise was a security. Our moving papers are quite clear what we specifically allege is the security here, your Honor.

MR. GOIDEL: Your Honor, may I just be heard in one other respect? I have asked the question and I am not going to literally argue the merits, which I think should be set forth in a brief -- a memorandum of law, rather, that

will be presented to your Honor at the close of the case. I don't happen to agree with Mr. Garmansky in his interpretation of the Fifth Circuit cases -- case.

Yes, the courts say in certain instances you can treat them separately. But now, we are -- we are now deciding in this case whether we should, in fact, treat them separately for this particular case. That is yet to be determined. But certainly, again, we get down to when you ask a question, if there is any valid grounds for the asking of that question, this court should do so. And I am saying, let's get away from arguing the law on this particular issue as to whether or not we should treat wholesale and retail as separate and apart. I am saying, if for no other purpose, than to show intent, operation of the mind of the individuals who are accused of having improperly aided and abetted the sale of the security; that this is certainly material on that issue.

Consequently, I think it is a proper question, if only for that purpose.

THE COURT: Well, let me understand you. Are you saying that this is probative on the intent

of those who sent it out? That is, those who were on the executive board?

MR. GOIDEL: Yes, sir. I go even a step further, if I may, your Honor. While I said that a second ago, I will even go into another area.

Your Honor will have to, assuming that he were to find that injunctive relief is warranted, your Honor would then have to come to the issue of disgorgement as to whether or not there should be disgorgement at least from the three defendants that are sitting here.

All right.

An intent to commit a wrong becomes very important to a court of equity in determining whether or not any form of monetary penalty should be imposed upon an individual.

Now, we have -- and we have been going into this issue now for the last 10 or 15 minutes in different ways, as to who recovered large sums of money. Yesterday we went into the question as to how much money was realized by the officer shareholders of the corporation. These are the individuals who the Government accepted an $8500 offer from in full satisfaction as far as this

action is concerned, in full satisfaction of any penalties that should be imposed upon them, notwithstanding -- and I think we have already established and will establish further that they obtained a considerable sum of money.

And then your Honor will have to sit there and make a determination as to whether a person such as my client, who worked a year and a half of his life, actually marketing and retailing and earned a big $24,000, whether or not he is going to have to make an offer or a tenure of money back, the same thing as Mr. Kirschenblatt. And I think the question becomes very important as to whether the people who made the most money were not even prosecuted in this matter should be allowed to go free, and the small fry, if we can call them that -- who worked for their living, should be penalized.

Now, a court of equity can do a great many things when it comes to a question of damages. And all of these questions go to that issue.

MR. GARMANSKY: Your Honor, I want to make very clear at the outset, these are not damages. Mr. Goidel still insists on using that word. I don't remember if he received the Shapiro decision that

these are not damages. Let me emphasize that.

Now, Mr. Goidel has said we have not prosecuted the big fry, only the small fry. Well, we have this case, which contains 69 individual defendants who we feel committed the most grievous fraud and we are ready to show that if --

MR. GOIDEL: Okay. You have a chance to show that.

MR. GARMANSKY: We will show that they did commit the most grievous fraud including bank loans, the fraudulent use of loans. And I call that grievous.

MR. GOIDEL: You're testifying.

MR. GARMANSKY: Let me finish. I call that a fraud.

Those documents have no relevancy in this matter. They are simply inquiries put out by Mr. Bruce Katz, I believe, by one individual. They have no relevancy here. There is no intent.

I don't see how you can get a probative value from the intent, especially when the result is there was no reduction in the number of franchises.

MR. GOIDEL: Again --

MR. GARMANSKY: That is a fact, your Honor.

MR. GOIDEL: Well, wait. You're not testifying to facts. I must first put this in evidence and carry it down step by step. I don't even know yet if there is a reduction. According to this record, I certainly don't know whether there is a reduction. I will take it one step at a time. Right now I am offering this to help demonstrate issues dealing with the question of intent.

Subsequently, I may resort to it for another purpose. But don't presume in advance what my purpose is.

THE COURT: Is Katz going to be available as a witness?

MR. GOIDEL: Your Honor, Mr. Katz, as I have advised your Honor yesterday, and as I am advised by my client, he is in Florida somewhere and nobody knows where.

MR. GARMANSKY: That is not true.

MR. GOIDEL: Well, I don't know where he is and he doesn't know.

MR. GARMANSKY: Don't say nobody knows. Some people know.

MR. GOIDEL: Nobody, meaning my side of this

case. He certainly hasn't been here in spite of the fact that we have been on trial for four days.

MR. GARMANSKY: Your client hasn't been here either.

MR. GOIDEL: My client is subject to a phone call, which I made an agreement with you to have him here within one hour of any time you ask for him. Will you have Mr. Katz here for me in one hour?

THE COURT: Well, I must say I am in a quandary on this. Proof is always, I suppose, somewhat of a stream of disconnected bits of testimony, documentation, from which somebody eventually makes sense through argument and inference.

I think basically what Mr. Goidel seems to be arguing, is that some people connected with Galaxy, thought it was a bona fide operation and acted on that assumption.

If this is reflected in that, maybe the Court should take it for what it is worth, if that is the argument.

Now, I don't know who -- I haven't looked through it all here. I see the argument that a

proposal to limit distributors would be inconsistent with the idea that it was to be an expanding conglomerate of distributors, even though, as you say, I suppose, you have good reason to say that it didn't happen.

Now, I don't know. Maybe it didn't happen, because I am not sure I -- I have just given a quick look at this. But the very fact of a fixed number also may have some evidentiary value. I don't know.

(continued next page.)

MR. GARMANSKY: Your Honor --

THE COURT: It's difficult, as I say, in the present context, to view this as so totally outside the periphery of acceptable proof as to say I should throw it out now. It isn't like a jury case. In a non-jury there is probably a temptation to let it all fall in and see what the parties make of it at the end.

So I will permit you to offer it in evidence again.

MR. GOIDEL: Thank you.

THE COURT: As I say --

MR. GOIDEL: Your Honor, if I may just say this: --

THE COURT: I'm not sure --

MR. GOIDEL: If this were a jury case, I assure you I would not have offered it in this manner.

THE COURT: I am not so sure you wouldn't.

MR. GOIDEL: No, not in this manner. I would offer it, but not in this manner. I would have had Mr. Katz, here, in court, if I had to serve him last week when he was here in court with a subpoena to be here, and I would have worked it from that end.

THE COURT: Well, all right. I will take it for what it is worth.

THE CLERK: This will be marked in evidence as defendant Kirschenblatt exhibit F.

(So marked.)

MR. GOIDEL: Thank you very much, sir.

BY MR. GOIDEL:

Q Sir, was there a limitation on the number of franchises that could be sold?

A Yes.

Q Was this set forth in any document?

A Yes. It was on every contract that was ever filled out. It was in the manual . It was mentioned many times in other documents that I don't have reference to.

Q By contracts, sir, are you referring to plaintiff's exhibit 8, which is in evidence?

A Yes, I am.

Q So that this idea --

THE COURT: Is that plaintiff's exhibit 8?

MR. GOIDEL: Yes.

THE COURT: Yes, okay.

Q So this idea of limiting the number of total franchises that could be sold in the first instance, was not something new that developed at the time the

questionaire was sent out?

A No. It was developed in August of 1971.

Q What was the number, the maximum number of franchises that could be sold pursuant to the contractual arrangement?

A 1,079.

Q Now, sir, did you ever sell 1,079?

A No, I did not.

Q Now, could you explain to us how this figure of 1,079 was arrived at?

A Well, this was a New York state figure. That was what we figured we needed to service New York State.

Also, it was based on the average amount of income we hoped that each investor would receive if we reached a 10 percent saturation of the state.

Let me explain that.

If there are, in fact, 20,000,000 people in New York State, we broke it down and said, what is a very comfortable living for somebody? Well, we were offering a figure of $60,000 a year. That is a pretty comfortable living. So in order to earn $60,000 a year, a person would have to earn in excess of $1,000 a week. So we did it on a basis of 60 distributorships per million people, or 250,000 families, which, at a 10

percent saturation and $25 a week per family in food purchases, would amount to $1666 a week per distributor in earnings, which is in excess of $60,000 a year.

If you can understand all that.

Q Yes, I can understand it.

Now, sir, who executed this contract, that is, plaintiff's exhibit 8, in behalf of the corporation, if, and as when the application was brought to you and somebody wanted to purchase a franchise?

A It was always an officer of Galaxy Foods.

Q When you say an officer of Galaxy Foods, -- and I don't want there to be any semantic differences in what I understand and what you are trying to say. You mean one of the shareholders?

A No, I do not.

Q You do not mean one of the shareholders? Who do you mean?

A I mean that there were members of the executive board who approved applications.

Q Approved or signed?

A Signed. Well, that is the same thing in --

Q Okay. Who were they? Only if you know -- if you know for a fact that they did sign a contract.

A I do not know for a fact each person. I

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think we have to go through the contract and find out who approved which ones.

Q Are those contracts available somewhere?

A I can't testify to where they are, but I guess they are available.

(continued next page.)

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CROSS-EXAMINATION

BY MR. GOIDEL (Contd):

Q Do you know when you last saw them?

A I believe they were turned over to the Securities and Exchange Commission.

Q Well, now, sir, did you on occasion sign contracts for the corporation?

A Most definitely.

Q Did the other shareholders sign these contracts in behalf of the corporation?

A Yes, they did.

Q Now, sir, we have discussed at length the three types of meetings that were held, that is, Opportunity Meetings, Step-up Meetings, training sessions.

A Correct.

Q Sir, were there any other types of meetings?

A Yes, there were.

Q What other types of meetings?

A Some were called a distributors' meeting or a warehouse meeting that was held by the officers of the corporation in which only investors or people who were already in the business were permitted to attend.

Q Where were these meetings held?

A They twere either held in our offices, in the

warehouse or in a large meeting room that the corporation rented.

Q Now, so that we are clear on this, sir, this is not an association meeting of the association that was organized by the distributors, this is something called by or convened at the request of the corporation itself; is that correct?

A That's correct.

Q How frequently were these meetings conducted?

A Well, in the beginning perhaps once a month but then in 1973, in the latter part of '72, particularly, much more often, I would say once every two weeks. On occasion it was once a week.

Q What was discussed at these meetings, sir?

A Well, such things as the pilot program projected dates, what was needed to make those projected dates realities; payment of commissions on the pilot program; any new announcements of intended rules or regulations -- just policy in general of the whole corporation.

Q Policy as relates to retailing?

A And sales of franchises; policy as relates to everything.

Q Were votes taken at these meetings?

A Yes.

Q On such subjects as what, sir?

A On such subjects as the quota.

Q The quota that we are speaking about as 1,079, whether or not it should be reduced to the 900 and so forth?

A That's correct.

Q Yes.

A On such subjects as whether or not the one per cent that we were going to pay to salesmen for the orders that they initially had gotten was an in-perpetuity type figure.

On Rule and Regulation 21 --

Q What was that, sir?

A The buy-back agreement, the guaranteed investment that we have been discussing, on every rule and regulation after that, on whether or not there should be a mandatory training within a certain given period of time, on conduct at Opportunity Meetings, on -- just the whole -- everything about Galaxy Foods was discussed.

Q In other words, if I understand, anything that would in any way affect the distributors and their relationship to the business.

A That's correct.

MR. GARRAGHY: Objection, your honor, that is not what he's testified to. You can't just lump

it in, as Mr. Goidel is trying to do and get one big answer.

I move to strike that answer if the reporter picks it up.

MR. GOIDEL: I withdraw the question, your Honor.

THE COURT: All right.

BY MR. GOIDEL:

Q Can you sum up for us, sir, in your words, what was discussed at those meetings?

MR. GARMANSKY: The witness has already answered the question.

Q Is that all that was discussed, sir?

A No. It was a little broader than that.

Any announcement affecting the operation of the franchisee's business was made then and in many occasions before a decision was reached, those particular things were discussed -- not in every occasion, I don't want to make it sound like we did nothing except offer suggestions to them and then decide what happened, but on many occasions things were discussed that affected their business.

Q Now, sir, you used the figure of $60,000. That's a very substantial figure for anyone to earn.

A It certainly is.

Q For anyone to earn.

A I would agree.

Q Were any somewhat lesser figures used?

A Yes. Further on, I don't remember what time it came about --

MR. GARMANSKY: Can we have the time?

Q When -- when were lower figures used?

A I may be able to refresh my recollection from three, four, five and six, Plaintiff's exhibits. I don't need six.

Q Let's see if we can speed this up a little bit.

You heard Mr. Kirsch speak in his cross-examination of the fact that he used a figure of $125?

A That's correct.

Q Was that figure used?

A Oh, yes, yes, that figure was used.

Q In other words, in addition to using a $60,000 figure illustratively, other figures were used?

A That's correct.

Q And could you tell us what figures?

A Well, $125 a week, $150, $175, $200 a week. There was also a breakdown of commissions that could be earned by sponsoring another individual in.

The highest figure on that that I've ever

seen on the blackboard was $2,450.

Q This figure of $60,000 that was put on the blackboard, sir, tell us exactly how it was writtin? Did it say "You will earn $60,000 a year"?

Tell me what was said.

A Just $60,000, that's all that was written.

Q Just the number $60,000?

A That's right.

Q Did the speaker or speakers thereupon use that figure, point to it, refer to it, say it outloud?

A They emphasized the fact that it was built -- it was built up from a whole presentation, it was a final point of the presentation.

Q You are telling me that that figure was used and I'm asking you now. Did you ever make the speech yourself?

A Yes.

Q Make it. Start at the beginning and make the speech for me.

A I couldn't possibly start at the beginning. We'd be here a long time. Let me pick it up from where it is.

Q I'm not being facetious, sir. You are telling me that the figure $125, was used and the figure $60,000.

7 Lieberman - cross - Goidel

Are you telling us that it was used in steps showing that if you did so much work, so much could be earned, if you had so many customers, so much could be earned, and so on and so forth? Is that how it was used?

A That's what I'm saying, yes.

Q Did you ever say to somebody, "You will earn $60,000"?

A Absolutely not.

Q Thank you.

The distributors who would enlist applicants would take an application and present it to whom?

A After it was filled out or before?

Q After it was filled out by the applicant?

A And the check was there.

(Continued on next page.)

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CROSS-EXAMINATION

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BY MR. GOIDEL: (Cont.)

Q Did the check have to accompany the application?

A Before we got it, yes.

Q Before you got it, okay.

A They would present it to -- generally they would try to find one of the corporate officers, but most of the time it would go to field operations.

Q And field operations would be Mr.--

A Mr. Roth at certain times, Mr. HOrowitz preceding him -- no, Mr. Katz preceding him.

Q And they would execute the contract?

A Many times, yes. Sometimes if I was handy or Mr. Avni was handy or Mr. Rosenthal or Mr. Horowitz, they would have preferred, of course --

Q Yes, sir.

A For us to meet them, if nothing else.

Q Now, sir, did you ever reject an application?

A Oh, yes.

Q You mean somebody offered you a check and you refused it?

A Oh, yes.

Q How often did this happen?

A Not that often, but there were times. I would say ten times.

Q Can you give us a reason for rejecting it?

A Yes. Well, the application is just that, it's an application. There are parts on it that must be filled out.

MR. GARMANSKY: Your Honor, before we continue, my objection is that may we identify these people, and did Mr. Lieberman reject them, if he had conversations, or is this hearsay from other people, what exactly happened?

Q I assume, sir, this is the normal course of business of your corporation, to follow this routine, is it not? This was done in the ordinary course of the operation of your business?

MR. GARMANSKY: To follow what routine?

Q The routine you are outlining now.

In other words, somebody would get an application accompanied by a check, present it to an officer of the corporation who in turn would either accept it or reject it, isn't that correct?

A That's correct.

THE COURT: Let me ask you this: Did you ever personally reject an application?

THE WITNESS: Yes, I did.

THE COURT: Do you remember the circumstances?

THE WITNESS: Yes.

It had nothing to do with the application itself, it had to do with the man. He had --

THE COURT: We are assuming that's what you are talking about.

THE WITNESS: Right.

He had gone to training before he came into the company. He wanted to see what he was going to be learning. After he went -- he was very curious in training and energetic and everything, and afterwards he came to me and he was making some sort of remarks about how interested we were in selling franchises, and that he said that this was -- seemed to be a great idea and it looked like it was going to be the entire purpose of Galaxy, and I said, "Sorry"-but we had at the time 300 left to sell, and I said, "That's not the purpose,'and no matter what I tried to do, I had the feeling that this guy was trying to make me say that that was the purpose.

He had already put in a rather large deposit. I believe it was a $1500 deposit. I gave him back his deposit and his application. He was

there with the rest of the money and I told him that we would not accept it.

It was a $3000 check.

BY MR. GOIDEL:

Q Any others that you specifically rejected?

A There was another person who was just -- again, I don't remember this person's name, but he came there with everybody in the world, he came with his accountant, his attorney -- not that we had any objection to that, but they were trying to go into a whole discourse on whether or not we were a legitimate enterprise.

Q I take it, sir, that notwithstanding that they brought their accountant and their attorney with him, that he did make out an application and submit a check with it?

A Oh, yes, he had it with him, as a matter of fact, and finally after the discussion was all over, his accountant and attorney said, "Well, it's up to you. If you want to do it, fine."

So he said, "Yes, I do, you know, I trust these guys and I want to get into this business." And we rejected him.

Q Any others that you know of specifically?

A No, I don't know of any others that I rejected specifically.

Q Well, do you know of any -- let me ask you this: In the regular course of the business of your corporation, if anyone else rejected an applicant would that be reported to you?

A Oh, yes.

Q Were any such reports made to you?

A Yes.

Q And if so, by whom?

A By Bruce Katz, by Steve Roth, by Charles Horowtiz, in particular.

Q In each one of those instances, a check had already accompanied an application?

A Well, there were 60 --

MR. GARMANSKY: Objection on that, if the witness knows because it was rejected he would not have gotten the application.

MR. GOIDEL: That's not so.

Q The rejection or the acceptance of an individual would only come, sir, after an application was accompanied by a check, isn't that correct?

A Yes.

Q So that it stands to reason that if it were rejected, the check, too, was rejected?

A Yes.

MR. GOIDEL: Thank you.

MR. GARMANSKY: Ask the witness if he himself saw the check?

It may not have accompanied the application.

MR. GOIDEL: It was reported to him in the regular course of business. He was an officer of the corporation, that's all I have to establish, I think. You can bring it up on redirect.

Your Honor, may we have a five-minute recess?

THE COURT: I will make it ten.

MR. GOIDEL: Thank you, sir.

(Recess taken.)

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(Witness resumes the stand.)

MR. GOIDEL: Your Honor, before proceeding, I would like to offer into evidence the cash disbursement book and the receipts book of Galaxy Foods, Inc., in evidence.

THE COURT: All right.

MR. GOIDEL: Any objection?

MR. LERNER: Can we get an authentication on the books, your Honor?

MR. GOIDEL: I believe he did so yesterday, but I will do it again.

BY MR. GOIDEL:

Q Sir, I show you a ledger that purports to be a cash receipts and cash disbursement book of Galaxy Foods, Inc.

Have you ever seen this book before?

A Yes, I have.

Q Can you tell us what it is, in fact?

A It is the cash receipts and cash disbursements book of Galaxy Goods.

MR. GOIDEL: Thank you, sir.

Do you wish me to go further?

MR. LERNER: May we have a voir dire?

THE COURT: Yes.

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Q Mr. Lieberman, did you maintain that record?

A I did not.

Q Who did?

A Susan Singer.

Q Did you ever approve the insertion of any figures in that record?

A I did not.

Q Did you ever make any additions or deletions in that record?

A I did not.

MR. LERNER: We have to object to that.

BY MR. GOIDEL:

Q Sir, is this record kept in the normal course of business of Galaxy Foods, Inc.?

A Yes, it was.

Q By an employee of Galaxy Foods, Inc.?

A Yes, it was.

MR. GOIDEL: Your Honor, it was a record kept in the --

THE COURT: Did you have occasion to refer to it in the course of your activities as an executive?

THE WITNESS: No, I did not, your Honor.

BY MR. GOIDEL:

Q Did you see it there?

A I did see it, but I did not refer to it.

THE COURT: Did you have occasion to consult Miss Singer from time to time about matters pertaining to the record?

THE WITNESS: Yes, I did.

THE COURT: And you have seen it?

THE WITNESS: Yes, I did.

THE COURT: And it was the books she kept in the regular course of business?

THE WITNESS: Yes, your Honor.

THE COURT: I will overrule the objection.

THE CLERK: Marked defendant Kirschenblatt exhibit G.

(So marked.)

Q Sir, before our adjournment we were discussing the rejection of applications. In addition to rejecting applications, sir, were any refunds made to persons who had already purchased a franchise, a refund of their original investment?

A Yes, there were.

Q How many instances were there of refunds to individuals who had already purchased a franchise?

A I believe it was somewhere between 12 and 16,

I'm not sure of the exact figure.

Q During what period of time were those refunds made, sir?

A September, 1971 to the demise of Galaxy Foods.

Q To be more specific, sir, were any of those refunds made prior to the announcement of litigation against the firm by the Securities and Exchange Commission?

A All of them were made prior to the commencement of any action.

Q Sir, were any of the distributors to whom franchises were sold residents of any state other than the State of New York?

A No.

Q Did any individuals make application for a franchise, who were not residents of the state of New York?

A Yes.

Q Were they accepted?

A No.

Q In each instance they were rejected?

A Yes.

Q Sir, do you know how much food was sold during the so called pilot program?

A Yes, sir, I do.

Q How much food was sold?

MR. GARMANSKY: Your Honor, is that dollar amount, tonnage?

Q Yes, dollar amount and/or tonnage, if you know both figures I will accept both.

A I have no idea as to tonnage.

THE COURT: Would there be unit quantities you might be familiar with?

THE WITNESS: No, your Honor.

THE COURT: Only dollar amount?

THE WITNESS: Dollar amount.

THE COURT: All right.

THE WITNESS: I believe the figure was $160,000.

Q For what period of time?

A From November 27, 1972 to March 31, 1973.

Q Approximately 5 months?

A That's correct.

MR. GARMANSKY: That's four months.

Q How was this food delivered?

A By truck.

Q A truck or trucks?

A Trucks.

Q Who owned the trucks?

A Well, it was a co-ownership. We had leased-

purchased 10 trucks from Olsen Leasing Company, but we had only placed a deposit and were making payment on them.

Q So that if I understand it, this is what is referred to as an open-end lease, where you lease it and that at the end of a period of time, after paying for so many months, you end up owning it; is that correct, or is that incorrect?

A I think it is a closed end lease.

Q I'm sorry, closed end lease.

A That's correct.

Q So at the end of the period in question, you end up with owning the truck.

A For $1 is the contract.

Q And there were 10 such trucks.

A There were 30 trucks on the lease, 10 in our possession, 20 more were to be delivered after -- at the start of the full scale retail operation.

Q How much money, if you know, was spent in acquiring food?

A I believe the total amount spent in acquiring food was $210,000.

Q You had a warehouse, is that correct?

A That's correct.

Q Did you own the warehouse or lease the

warehouse?

A We rented the warehouse, leased it.

Q For how many months did you lease that warehouse?

A From March, 1972, to August, 1973.

Q Did you have offices in the warehouse, as well as in Brooklyn?

A Yes, we did.

Q Were there any individuals specifically authorized or delegated, rather, to conduct their work in the warehouse, as distinguished from the office in Brooklyn?

A Yes.

Q Was Mr. Kirsch one of those individuals?

A Yes, he was.

Q And from the time of acquisition of the warehouse, and aside from any meetings you might have attended at the Brooklyn Office, were all of his activities in behalf of the corporation conducted by him at the warehouse?

A Yes, they were.

Q Did he have an office in the warehouse?

A Yes, he did.

Q Did you have equipment in the warehouse, other than trucks?

A Yes, we did.

Q Can you describe for us, the equipment that the corporation had purchased or had leased for use at the warehouse?

A Yes. Of course we had office furniture, first of all, which we had purchased. We had shelving, a freezer and refrigerator unit; computer, what are known as CRT's, cathode ray tubes, small little television sets, we had 12 of them.

THE COURT: For security purposes?

THE WITNESS: No, no, the CRT's were tied into the computer, but they are a separate deal from the computer itself.

Q What were they used for?

A They were visual screens were the actual sale was made, inventory could be charted, commissions could be viewed, all fed back that way.

We had a choice of either displaying on the screens or producing a hard copy.

THE COURT: You mean they were something like those gadgets you see down at the airport waiting rooms, is that what you are talking about, showing schedules, departures and so forth?

THE WITNESS: That's correct, your Honor.

We had four lift trucks, we had a security setup, including television sets and cameras. We had -- there are so many things I can't remember them. I mentioned the trucks, computer, shelving, freezer, refrigerator -- basically that's the large equipment that we had.

Q How much was spent on or for the computer?

A How much was spent?

Q Yes.

A I cannot recall.

Q Was it leased or owned?

A It was a lease-purchase, again the same thing.

Q What was the gross purchase, if you know?

A I believe it was $160,000.

Q How about the screens, the cathode tubes?

A They were being open-end leased; in other words, we would not own them, for $900 a month each.

Q $900 a month each?

A That's correct.

THE COURT: How many were there?

THE WITNESS: There were 10, 10 in operation; there were 12 altogether, your Honor.

THE COURT: You mean it was 10 or 12 times

$900 a month?

THE WITNESS: That's correct, your Honor.

Q That would be over $10,000 per month , sir, is that correct?

A That's correct.

Q How many months did you have that?

A Well, we had them from January, 1973 to the demise of Galaxy Foods. I'd say August. I believe they were picked up in August by Hazeltine.

THE COURT: How long was the period, did you say?

THE WITNESS: From January to August in '73.

Q Let me ask you this question because this is a substantial sum of money: to your knowledge, no one connected with Galaxy Foods had a financial interest in the corporation or company or companies that leased or sold this equipment to you?

A Oh, no.

Q Nobody received -- and let's use the word, a kickback on it, did they?

A No.

Q In addition to all of this -- first of all, let me ask you, how much was spent on floor lifts and how

many did you have?

A Those were rented from Bogels, B-o-g-e-l-s in Brooklyn. I don't recall what we were leasing it for. It wasn't that much. I believe it was like $100 a month. We had two, that I recall.

Q Did you have scales?

A Yes, we had scales.

Q Did you have machinery to package the merchandise that was going to be delivered?

A No, we had cartons, but we didn't have anything to package it. We had bags and boxes.

Q I take it then you had employees?

A Yes.

Q Whose job it was to package this merchandise, employees whose function it was to drive the trucks that delivered this merchandise, isn't that correct?

A That's correct.

Q And you had stockboys?

A That's correct.

Q In other words, you had an entire setup for the servicing, packaging, weighing, cutting, delivering of food?

A That's correct.

Q How many employees?

A Well, the most that we had at one time was 98.

THE COURT: 98 employees?

THE WITNESS: That's correct.

THE COURT: At the warehouse?

THE WITNESS: That's correct, your Honor.

THE COURT: Over what period of time?

THE WITNESS: That was for a very short period of time that we had that many.

THE COURT: Was that during the pilot program?

THE WITNESS: It was during the pilot program and it was probably only for about two months of the pilot program that we had that many.

THE COURT: What would have been the lower end of the figure?

THE WITNESS: I think the least that we ever had at one time was approximately 46.

Q Who was in charge of the warehouse operation and the employees that functioned there?

A Mr. Franz Quack.

Q Who was in charge of the purchasing of the food that was worked with at the warehouse?

A Don Kirsch.

Q And now, sir, I want to ask you this question: You told us when the action was commenced against you by the Securities and Exchange commission, do you know when the investigation first came to your attention?

MR. GARMANSKY: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: Yes. I believe we received the first subpoena in March.

Q Of what year, sir?

A 1973.

Q At that time, as I understand, Mr. Kirsch was no longer associated with you?

A That's correct.

Q And Mr. Kirschenblatt already terminated his franchise relationship with you?

A I believe that's correct, yes.

Q Now, sir, we have spoken about the opportunity meetings --

THE COURT: Forget that for just a moment.

MR. GOIDEL: Pardon?

THE COURT: Forget that for just a moment.

MR. GOIDEL: Yes, sir.

THE COURT: Do you have any overall number

of dollars representing the Galaxy outlay for all of the warehouse equipment he described? Just equipment first.

THE WITNESS: I probably could break it down, your Honor, pretty close as far as each item is concerned.

THE COURT: I am not much interested in the breakdown. I am interested in the overall -- you mentioned, for instance, you had an overall for sales of 160,000 in costs acquiring the food. And I assume it was $210,000. And I assume what you -- when you speak of that, you are not including in that any of the warehouse expenses.

THE WITNESS That's correct.

THE COURT: So what I am asking you is, do you have any reliable estimate or is there any document that might be available from which some statement could be prepared?

For example, did you receive as a corporate executive officer any kind of statement of affairs of the corporation showing --

THE WITNESS: Yes. We had an audit in May of 1973 by Ronald Elmann. And on that it had the breakdown.

THE COURT: All of the numbers?

THE WITNESS: Listed all of our assets, liabilities.

THE COURT: Is that audit available?

MR. GARMANSKY: The Commission does not have any such audit, your Honor. What we do have is a balance sheet.

THE WITNESS: I have the audit, your Honor.

THE COURT: You have the audit?

THE WITNESS: Yes. But not in court right now.

MR. GARMANSKY: Is the witness talking about work papers?

THE WITNESS: No. I am talking about the results of the audit.

Q Sir, will you bring that to court tomorrow?

A Yes, I can.

THE COURT: All right, I think you should.

Q Sir, I also asked you yesterday if you would bring the shareholders' agreement. Did you remember to bring it or did you forget?

A I didn't remember to bring it.

THE COURT: Here, write yourself a note.

Q Do me the favor, sir, bringing it in tomorrow.

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A Okay.

THE COURT: Do you need a pencil?

THE WITNESS: No. I have one.

MR. GOIDEL: Your Honor, I will not be going much further with this witness, but I would want to resume or reserve my right to continue my cross examination after both of those documents are brought in, just for the limited purpose of those documents. Would that be all right?

THE COURT: All right. I will permit that.

Q Now, sir --

THE COURT: One other thing that has occurred to me. Did I hear reference to a corporate minute book or corporate minutes?

MR. GOIDEL: Yes, sir. They are over there.

THE COURT: Was that placed in evidence?

MR. GOIDEL: No, sir, it was not. I may offer it in evidence, but I would want to wait until after lunchtime to do so.

THE COURT: You haven't had an opportunity?

MR. GOIDEL: No, sir, I have not.

THE COURT: That is the corporate minutes book that had been previously identified, had it not?

MR. GOIDEL: Yes.

THE COURT: I think it bears the signature.

MR. LERNER: Why don't we mark it right now?

THE COURT: I thought I had--it was never marked? Well, it isn't important to do it now.

MR. GOIDEL: Your Honor, I have here another ledger which I have not had an opportunity to go through completely. But I believe that this other ledger might break down the purchases of the machinery and equipment for us. So during --

THE COURT: I much prefer not to have that done on testimony.

MR. GOIDEL: No. What I was going to suggest is, I may well offer it in evidence after lunch and I will look it over at lunchtime.

If it contains that information, then I will offer it.

Q Sir, we spoke of opportunity meetings and we spoke of step up meetings. Was any form of written record made? In other words, did you have, for example, a secretary take minutes of those meetings or a stenotypist make a transcript of those meetings as to what was said?

A At one point we transcribed on tape an opportunity meeting. We did it a few times during the

period of time that we were in operation, but --

Q Where are those tapes?

A I have no idea.

Q Well, when is the last time you saw those tapes?

A During the period of time that Galaxy was in operation, but not since then.

Q Did you ever provide them to any third party?

A Yes, we did.

Q To whom?

A Federated Franchise of New Jersey.

Q Any governmental agencies ever listen to it?

THE COURT: What was that name? Provided to Federated -- what is it?

MR. GOIDEL: Federated Franchises.

THE WITNESS: No.

Q By the way, you had one warehouse; is that correct?

A That's correct.

Q In connection with the planning for the retail end of the business, was any discussion ever had as to the number of warehouses that would have to be maintained by the corporation in order to service the various

distributors?

A New York City, yes. That was the case.

Q How many?

A 20.

Q 20 warehouses?

A In New York City.

Q That would service how many people?

A 10 percent of New York City.

Q Well --

A 1.2 million people.

Q Thank you.

The customers who purchase food, were they the customers of Galaxy Foods or the customers of the distributors?

A They were the customers of the distributors. We also considered them our customers.

(continued next page.)

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CROSS-EXAMINATION

BY MR. GOIDEL: (Cont.)

Q Well now, when a person made a sale to an individual, did that individual thereafter have to go to his distributor to order the food, or could he go directly thereafter to you to order the food?

A No, he could go directly to us.

Q But who received the commission or who was to receive the commission on that sale?

A The distributor.

Q Notwithstanding that the customer would contact you directly?

A That's correct.

THE COURT: Let me ask you this. Was it contemplated that each distributor would have his own -- for lack of a better expression -- service unit or office where his customer could call in orders.

THE WITNESS: Yes, your Honor. We hoped that. Of course, this was all in planning. But it never reached that stage. We hoped that each distributor would maintain an office for the purpose of contacting his sales representative and having meetings with them or perhaps any field managers that were

still in his organization. This wasn't required, but we hoped that he would do this. So that, for instance, when he got his monthly statement it contained a breakdown of his own personal customers and all the volume of the individuals that were in his organization. And he might want to review that and say to John Doe, "John, you didn't do a very good job this month. You only picked up 12 new customers. Now, what seems to be the problem?" And that sort of thing.

We had hoped that that would have happened. Of course, it never came to that.

THE COURT: Perhaps if I -- if I may for a minute, I'd like to have a little clearer understanding of what was envisioned here as the actual plan of operations in the event food distribution began. I heard this referred to as free home retail food distribution.

THE WITNESS: That's correct.

THE COURT: Free home delivery.

THE WITNESS: Yes.

THE COURT: Free home delivery.

Now, each distributor would have employees; is that correct?

THE WITNESS: Yes.

THE COURT: Was that the idea.

THE WITNESS: Or he could do it himself. But we taught him --

THE COURT: I mean he did it himself or he hired people to do it for him.

THE WITNESS: Yes.

THE COURT: Now, when you speak of salesmen, these salesmen were employees of whom? The distributor or Galaxy?

THE WITNESS: Theyware employees of the distributor. However, Galaxy was doing the paper work on paying them. They were registering with the company and receiving training from the company.

THE COURT: Yes.

THE WITNESS: However, they were directly responsible to the individual who employed them.

THE COURT: But you mean there -- now, did they work entirely oncommissions?

THE WITNESS: Yes, they did. Everyone except the people who worked in the warehouse.

THE COURT: Yes. So these commission salesmen, their commissions would be paid by Galaxy?

THE WITNESS: That's correct.

THE COURT: And would they be in the nature of routemen? That is, they would have cars and would endeavor to obtain customers who were prepared to call in orders for this free home delivery of food.

THE WITNESS: That's correct.

THE COURT: Was that the basic idea?

THE WITNESS: That was it.

If your Honor would like, I will go through the ordering procedure so that you can understand how we tied these commissions in and how we understood who was who, who belonged to who. Because if you've got hundreds of thousands of people running around getting customers without a route, as you have explained it, or without a guaranteed area -- the only guarantee we could offer, therefore, is that the customer obtained -- would be guaranteed to the person who obtained it. And we did that in a rather unique manner.

THE COURT: Well, perhaps it would be helpful tounderstand this.

THE WITNESS: When acustomer was acquired -- let's start from the --

THE COURT: By a customer, we are now talking

about the average person.

THE WITNESS: That's right. Mrs. Jones.

THE COURT: Someone who is going to eat the food.

THE WITNESS: That's correct.

THE COURT: Is that right.

THE WITNESS: That's correct.

THE COURT: All right.

THE WITNESS: First of all, this person would have to live within a 3 mile radius of any one of our projected warehouses. In the case of Galaxy's first warehouse, the entire retail area was to be a 3 mile radius of 303 Stanley Avenue in Canarsie. We felt to try to deliver outside of that retail area would be unprofitable because the truck would simply take too long to get there and wasting too much of our money.

THE COURT: I see.

THE WITNESS: That's the necessity for the 20 warehouses that we --

THE COURT: So you were situated roughly at the center of a 3 mile radius.

THE WITNESS: Right, your Honor. And we estimated there were approximately -- I believe the

figure was 30,000 families living in that area. I take thatback. 200,000 families living in that area. There was quite a big population. It took in Canarsie, Howard Beach, East Flatbush, parts of Flatbush, and then all the areas to the south which were Spanish and Black areas, low to middle income areas.

The salesmen would either answer a lead which we furnished him through advertising about the service, or he would cold canvas knocking on doors, a la Avon, or whatever it might be, asking the people if they would like to try a free home delivery service of all supermarket items, and showing them the catalogues -- which I don't have right here, but it's a -- the orange catalogue that was offered to Mr. Kirsch before to identify, and telling them that they would receive one of those catalogues.

THE COURT: After placing --

THE WITNESS: After placing their first order. Those catalogues of necessity are a little bit expensive and we just couldn't give them out to anybody. They would receive it in their first order. It would come with it.

Then they were shown the catalogue and asked to place a $7 minimum order which -- that was for the pilot program. At full scale retail operations we anticipated a $15 minimum order.

The sales representative, whether it be a salesman, a field manager or distributor, would then call the food phone number -- that was the name of the service, food phone. They would call the food phone number. The operator on the other end -- this is during the pilot program -- took the order manually. But on a full scale retail operation she would have been taking it over these cathode-ray tubes. There was a form on the screen. She would simply fill in the form. Then she would press the transmit button which would go into the computer for storing and memory. She would ask that woman also, the customer, what time she would want the order delivered on the following day, within a 2-hour time span, so the customerdidn't have to stay home.

At the end of the day, we would start the high-speed printer which would print out hard copies -- 6 of them of the order. One would go to the picking area, one would go to the truck, one

would go into the distributor's files, one would go to inventory. The computer was programmed to automatically deduct those items that were ordered from inventory. It was also programmed to select a customer number for the customer.

She would be ordering, by the way, in a code. So rather than saying, Campbell's Tomato Soup, she would say 4822, quantity one. That would be the instructions of the -- the instructions in the catalogue and by the representative that she was ordering by number. And that code number she was assigned was a 9-digit number. It also reflected what the distributor it was that got the order, through what field manager, through what salesman.

In other words, it told us -- it identified to us who got the order. The computer would keep in memory the amount of that order. And later on when we wanted, it would generate a program to produce and cut checks for everybody concerned, if it was a field manager or distributor or salesman, or all three on the same order, which it could be.

Then the order would be picked according to number from shelves which we had made for us and placed on racks. When the racks were fully loaded

the racks were slid into trucks. And we had a routing sheet made by the computer which would tell us which were to go to what place in order to comply with that time span that each person made.

It was a very complex, well-worked out system. I don't think I have left anything out as far as the basic arrangements. But it was five times more complicated than I have made out to you right here in Court because simply the programming alone I believe had cost -- it was supposed to cost us $60,000 just to arrange for the programming of this computer. I believe we paid a substantial amount of that. And it was all to be put on two very small bits about this big (indicating) that were put in memory and drawn from it any time that we wanted to.

We had personnel who were working this computer. The girls who were taking orders did not have to be specially trained. All they were were typists who could answer a telephone. Mostly wives, girlfriends or relatives of the distributors.

And out of the 97 employees in the warehouse, I believe we had 48 -- out of the 98 employees, I believe 48 of them were either related to or friends

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of the distributors or the distributors themselves who were working in their spare time to try to make the system work.

The Court allowed me a great deal of time to--

THE COURT: No. It's very enlightening.

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MR. LERNER: Your Honor, I certainly feel I am on more firm footing to object than Mr. Goidel, and I don't intend to be so technical, but I would like to bring to the Court's attention that the Commission -- it is our position that Mr. Lieberman's answer is totally irrelevant to our allegations in the complaint.

THE COURT: Well, all right, I understand your objection. I feel, however, there may be relevance to the type of operation we have here to the basic questions this kind of case raises.

However, I -- I think that it would be better to be perhaps overfed than underfed in this case.

MR. LERNER: I don't think we areunderfed at all in this case.

THE COURT: Now, you had a rest with my question.

MR. GOIDEL: Your Honor, I have no further questions. You saved me about 15 minutes of examination at least.

THE COURT: All right. Now, let's see --

MR. GOIDEL: Subject, of course, to the shareholders agreement which I have requested, and

also my right to review this and offer it in evidence. That is the ledger book. And Iam going to look at that.

MR. GARMANSKY: Yes.

MR. GOIDEL: I will look at it during the recess.

And also the accountant's statement which the witness says he will return tomorrow.

THE COURT: All right.

MR. GOIDEL: Thank you, sir.

And the corporate books which I will look at.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. PADILLA:

Q Now, Mr. Lieberman, how long do you know me?

A Approximately two years. Two and a half years.

Q How did you come about knowing me? How was our acquaintance started?

A You came into Galaxy Foods as a field manager, I believe.

Q Did you ever know me before then?

A No, I did not.

Q Did you ever know me to be associated with

any of the officers of Galaxy Foods before I entered -- before I came to Galaxy Foods?

A No, I did not.

Q Okay.

In what position did I enter Galaxy Foods as?

A I believe it was as field manager.

Q Did I make an investment?

A Yes, you did.

Q How much was that investment for?

A I don't know. I don't know whether it was 1 or $2,000, But it was certainly 1 or 2.

THE COURT: What was it, Mr. Padilla.

MR. PADILLA: It was 1,000 when I entered Galaxy Foods.

THE COURT: We might as well get it now.

Q Do you recognize what that is?

A Yes, I do. This is a field manager's evluation form of George Padilla.

MR. PADILLA: Your Honor, I would like to have this marked as exhibit --

THE COURT: Why don't we just continue the alphabetical order.

THE CLERK: This will be defendant Padilla's exhibit A.

THE COURT: Well, no. I am suggesting that you just go right on in alphabetical order.

THE CLERK: Continuing with the other defendants.

THE COURT: Yes. Whatever the last one was.

THE CLERK: All right. G was the last one.

THE COURT: All right, make this H.

THE CLERK: This will be H. Defendant's exhibit H for identification. So marked.

(So marked.)

BY MR. PADILLA:

Q Mr. Lieberman, would you again look over this and read the contents of this?

A "This is to certify that George Padilla, a duly registered field manager with Galaxy Foods, Inc., has this day invested the additional sum of $2,000 in order to elevate to the position of distributor in accordance with the Galaxy marketing concept.

"This additional investment constitutes the total requirement necessary to become a distributor. The new distributor should continue to conduct himself with honesty and integrity and take advantage of all training as made available by Galaxy, realizing that these are the factors that will help to insure him of his goals being

attained."

And it's dated March 19th, 1972. The sponsor's name is Alicia Gunning and the social security number of the sponsor. Then there is your signature and your social security number. And it is approved by Kenneth C. Rosenthal, chairman of the board of Galaxy Foods.

Q Thank you.

MR. PADILLA: Could I have it marked in evidence.

THE COURT: Show it to counsel.

MR. GARMANSKY: No objection.

MR. GOIDEL: I have no objection.

THE CLERK: Defendant's exhibit H now in evidence.

(So marked.)

THE COURT: Did you pay $2,000, Mr. Padilla.

MR. PADILLA: $3,000.

THECOURT: No. On this, $2,000?

MR. PADILLA: I know. I paid the $2,000. That was to become a distributor. That was an elevation.

THE COURT: I thought youpaid 1,000 to become a field manager.

MR. PADILLA: Yes. But it was 3.

THE COURT: So it was a total of 3.

MR. PADILLA: 3,000 all together.

(Continued on next page.)

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CROSS-EXAMINATION

BY MR. PADILLA (Cont'd):

Q What does the meaning of director in Galaxy Foods -- as talking about director of wholesale, director of marketing, director of training or what? What does this mean in Galaxy Foods? What does this position mean? Does the director mean that the person is an officer of the company?

A No. It didn't. It was a sub-management position -- sub-management, that's a bad term.

It was a lower management position. A director in the terminology that we are using it here, as far as the ones you've listed, director of wholesale or retail or whatever it may be, reported to an executive vice-president and was a lower management position. That's all it was.

Q Did directors have any say in policy-making in Galaxy Foods?

A They could -- the could offer suggestion but they were not officers nor executives. So they didn't have any say as to policy-making in Galaxy Foods.

Q What different directorships were there in Galaxy Foods, different categories?

We mentioned wholesale, retail; were there

any others?

A There was director of distributor relations that we talked about before; there was director of wholesale sales, which was the sale of franchises; there was director of retail, there was director of sales aids, which were --

THE COURT: Sales aids?

THE WITNESS: Yes, which we had mentioned before that this was paid for -- this Plaintiff's Exhibit 11 was bought and a few other -- I think, buttons, we sold buttons that said, "My name is _____. What's yours?" That type of thing for the meetings.

That was basically the director position.

THE COURT: It seems to me someone mentioned a director of transportation.

THE WITNESS: Right. For a time we had a director of transportation, director or warehousing, subordinate positions underneath the executive board levels, but those were -- like director of transportation, I believe, was only in existence for a few months until we could find somebody to replace the late Mr. Rosenbach who passed away.

Q Was there also a director of administration?

A Yes, for a period of time there was a director of administration.

Q Director of marketing?

A I don't believe there was ever a director of marketing.

Q After Mr. Kirsch left the company, was another -- someone else assigned as vice-president of marketing?

A Thank you. There was a director or marketing. There was, I believe his name was Henry Hansen, who was given that position temporarily.

Q Now, to go back to director of wholesale, who was the first person holding that position in Galaxy Foods?

A I believe it was Steven Roth.

THE COURT: Who, Steven Roth?

THE WITNESS: Yes.

Q Do you believe or do you know for sure?

A I believe it was.

Q Is it my understanding that Steven Roth was director of training, or director of field operations at the beginning; is that right?

Does Bob Cody refresh your memory as director of wholesale?

A Thank you. Bob Cody. Obviously Mr. Padilla's

information is much better than mine, or recollection.

Q Not my information, I have no information. Perhaps my memory.

A Okay.

Q Bob Cody, it's understood Bob Cody was the first director of wholesale of Galaxy Foods?

A I would agree with that.

Q While he held that position, did Mr. Cody receive any sort of commissions from Galaxy Foods, Inc.?

A I don't recall.

Q You don't recall, you don't know --

A I don't remember.

MR. PADILLA: The records would show, again the ledger of disbursements -- can I have it?

I'm going to have to go back through here because --

MR. LERNER: Can we get a point in time when Mr. Cody was the director?

BY MR. PADILLA:

Q For what period of time was Mr. Cody the director of wholesale?

A Well, it was probably -- I can't testify directly again, but I would say the records would reflect it for one thing, and it was probably early part of 1972 or the

latter part of '71. It was very early in the Galaxy operation.

Q For how long, more or less, period of time; six months, seven months?

A I think we can find out from the records because I don't recall.

Q Would that be in the record?

A Yes. If that's the cash disbursements.

THE COURT: Do you think you can let that go until the lunch hour and turn to something else?

MR. PADILLA: Certainly.

THE COURT: Or is that all you have?

MR. PADILLA: No.

Q Who was the second person to hold the position as director of wholesale of Galaxy Foods?

A I think George Padilla was the second person.

Q Let me refresh your memory a little bit.

Do you remember a gentleman by the name of Walter Martin?

A I thought he came after Mr. Padilla did.

Q Very impossible.

THE COURT: Did you say very possible or very impossible?

MR. PADILLA: Yes.

BY MR. PADILLA:

Q Let me refresh your memory back to June of 1972, when Mr. Cody was either fired or reduced from the position of director of wholesale and Mr. Walter Martin was made director of wholesale.

Does that refresh your memory? Is that a fact? Do you recollect that?

A I don't remember it. May I apologize. I really don't remember it.

Q Who was -- on September 1, 1972, certain promotions were given, and someone was promoted from director of wholesale to vice-president in charge of retail operations.

Who was that gentleman?

A Was promoted from --

Q Director of wholesale to --

A Vice-president of retail?

Q Of retail operations, yes.

A I would think --

Q And he held the position until Galaxy ended?

A Vice-president of retail operations?

Q I'm sorry, vice-president in charge of wholesale operations.

A Are you referring to executive vice-president in charge of field operations?

Q Not executive, vice president.

September 1, 1972, at the banquet --

A I thought you were talking about Steven Roth, but he was --

Q Not at that time.

The person who was the national director of wholesale was promoted to vice-president in charge of wholesale operations.

A I don't know, George.

Q You don't know?

A I don't know. You are talking about yourself? You weren't that -- I don't know, I'm sorry.

Q Steven Roth used to be -- am I correct in saying that Steven Roth was the executive vice-president in charge of field operations?

A That's correct.

Q He was promoted on October 1st to first vice-president --

A Of the executive board.

Q -- of the executive board?

A That's correct.

Q Someone had to come in to fill that position -- fill the position of vice-president of field operations. Who headed that, took his job over?

When he was promoted to first vice-president, who took that job over? Was it Walter Martin?

A No.

Q Was Walter Martin ever a vice-president in Galaxy Foods?

A I don't believe so.

Q You don't believe so or you don't know so?

A I don't know.

Q Mr. Lieberman, I can't believe that you are telling -- you're under oath here.

You promoted the person yourself and I can't believe that you are acting in good faith when you say you don't believe the man was vice-president when he held the position for more than one year in Galaxy Foods.

A George, I don't remember what his title was. There is no doubt in my mind --

Q He was a vice-president, no matter what it was, whether it was one thing or the other.

Was the man ever vice-president, not an executive vice-president, but held the position of vice-president? Did he ever do that?

A George, I understand that Mr. Martin was involved in the field operations for a year selling distributorships and supervising in the same capacity that I thought you

had held. But what his title was is what I don't recall.

MR. PADILLA: Again, the records will indicate to show that -- again, after lunch we will go into that.

I will move to another area.

Let me bring your memory back since it seems like all of a sudden you are starting to forget a lot of things.

Let me try to refresh your memory back to when retail started around November of 19 -- let me forget that and go beyond that. Go back to June of 1972.

Did Galaxy Foods hold what was known as an advance business market school?

A Yes, it did.

Q Do you remember whether I -- I'm not going to ask you who the others were -- but whether I was one of the persons who attended that school?

A Yes, you were.

Q Prior to that, what was I doing for a living?

A Prior to June, 1970?

Q Yes.

A You were working as a New York City policeman.

Q At the time that I entered Galaxy Foods, what was I doing for a living?

A You were working as a New York City policeman.

Q What were the qualifications for a person to go for one of the advance schools at that time in Galaxy Foods, if you remember?

A He had to be a full distributer not a field manager. He had to be full-time in Galaxy, and he had to want or seek a position in management in Galaxy.

Q So now --

A One more. He had to be nominated by somebody, some officers of the corporation.

Q Do you remember who nominated me?

A No, I do not.

Q What was the purpose of the advance management school?

A It was to prepare people for management positions in Galaxy.

Q Who were the instructors at the schools?

A I believe Bruce Katz was an instructor, I believe I helped there for one day and spoke at an advance school, I believe, I'm not sure if Steven Roth was at that school or at a subsequent one, I don't remember anybody else.

I know Bruce was definitely there. He was conducting the school.

Q How many schools like this were held?

A I believe three.

Q June 2nd, was that the second school in June?

A I believe so, yes.

Q If I refresh your memory, the instructors there were Bruce Katz and Steven Roth and you didn't attend that school yourself?

A It was one of the other schools.

Q Isn't it a fact that that national director of wholesale in Galaxy Foods was to receive a half a per cent of all the volume made in the wholesale operation of Galaxy Foods?

A Was to receive? If it was approved by the executive board, yes, he was to receive it. Whether or not it was always approved, I don't know.

(Continued on next page.)

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CROSS-EXAMINATION

BY MR. PADILLA: (Cont.)

Q When you say "approved" you are talking about a vote in the Board of Directors?

A On the executive board, that's correct.

Q On the executive board.

Now, Walter Martin, for a while was the National Director of Wholesale?

A That's correct.

Q Do you remember if he received a half a percent?

A I believe he did.

Q Again, Bob Cody was the National Director of Wholesale.

Do you remember whether he received a half percent?

A I believe for part of the time he did.

Q Some part he did and some part he didn't?

A I believe there was some part he didnt.

Q Do you know for a fact what part he did or what part he didn't.

A I believe it was during the first -- his his first part, the first few months or whatever it might have been, few weeks, he didn't.

Q Thereafter he did receive it?

A Yes.

Q And he received it until he was no longer the director of wholesale?

A I believe that's so, yes.

Q And Walter Martin received commissions all the time that he was national director of wholesale; isn't that a fact?

A I believe so.

Q I was also the national director of wholesale. Do you remember if I received any commissions?

A I know that you didn't.

Q Why?

A I don't know.

Q Why, what was the difference the way that I performed the job versus the others, why didn't I receive a commission or was never told that I was to receive a commission, never informed that a commission was to be received until after -- when the others did receive it, what was the difference between me versus the other two persons who held the positions before me?

A I don't know.

Q Maybe they felt I didn't need the money? Maybe

they felt I wasn't competent, I wasn't doing the job right?

A I don't know.

Q How long do you remember me holding that position as National Director of Wholesale?

A A few months. I believe two or three months.

Q Does Septebmer 1st through middle of October sound right, mid-October?

A That's two months. I would say that's correct.

Q Now, prior to my being made National Director of Wholesale on September 1st, what was -- was I doing any sort of functions in Galaxy Foods other than selling -- than seeking new investors?

A Yes.

Prior to that you were president of the association.

Q Was I doing anything in the retail aspect of Galaxy Foods?

A Prior to --

Q To my being made the National Director -of Wholesale?

A Yes, you were working with Mr. Kirsch, I believe, in Spanish foods.

Q Isn't it a fact that I was just merely more

than working, isn't it a fact that I was putting in like ten, twelve hours a day in the warehouse working to get together a Spanish catalor prior to that time?

A Well, just by not stating our the entire term of how hard you were working, I didn't mean to imply that you were doing no work. Yes, you were working from hard at it from what I understood from MR. Kirsch's reports.

Q Was I ever told, prior to the banquet on September of 1972, that I was going to be promoted to National Director of Wholesale, did I ever -- was I ever told that by anyone?

A No.

Q By you, was I ever told that by you?

A I thought it was supposed to be a surprise. I don't recall.

Q Did I ever ask or seek that position in Galaxy Foods, that particular position?

A I don't believe so.

Q Would I be correct to -- would it be a fact to say that it caught me by surprise, I didn't know about it and because of my being made National Director of Wholesale I had to stop whatever else I was doing in the retail operation of Galaxy foods because of that reason,

because now I had other responsibilies?

A I would say that would be correct.

Q Now, do you remember what was the rsason for my resignation?

A No, I do not.

Q Do you recall who received -- did you yourself receive my resignation?

A I don't recall. I might have received it indirectly, but I don't remember getting one directly.

Q Do you remember the item, seeking it, looking at it, reading it?

A It's quite possible. I murt have seen it, but I don't recall what it said or anything.

Q During Galaxy's retail operation, was I actively involved in the getting of customers?

A Yes, you were.

MR. PADILLA: I wish to have this marked as an exhibit. These are eight orders.

THE CLERK: Eight documents stapled together marked for identification as Defendant Exhibit I.

(So marked.)

BY MR. PADILLA:

Q Do you recognize thsse?

A Do I recognize these?

Q Yes.

A I know what they are, yes. They are orders for food from customers living within the pilot area, and they are all with the name Padilla as agent for the sale.

MR. GARFANSKY: Objection.

MR. PADILLA: Your Honor these documents are orders, all what I could find of approximately many more of these, about 50 or 60 of them of individual customers that I had myself had obtained during the Galaxy retail operation when I went out seeking customers.

These were the ones I could find. It showed ar order, how it was taken, items, what we did in the field, and I'd like to have this introduced as evidence.

THE COURT: It will be received.

THE CLERK: So marked in evidence as Defendant's Exhibit I.

(So marked.)

BY MR. PADILLA:

Q Were there any other officers in Galaxy Foods or directors that received overrides over the entire volume of Galaxy Foods operation that were not been named here as a defendant?

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A Yes.

Q Would you name them?

A If I may use that -- the brown book up here, to refer to.

Q Yes (handing).

A First of all, of course there is Kenneth T. Rosenthal. Mr. John Celano, Mr. Thomas Rosenbach, who doesn't appear.

THE COURT: He's deceased, isn't he?

THE WITNESS: Yes.

A Mr. Franz Quack, Mr. Chris Marinaccio, Mr. Walter Martin, Mr. Ralph Martin and that's it, as far as I can remember.

Q Isn't it a fact that there were --

A One more, Mr. Ernest Melendez.

Q Was there any position in Galaxy known as an area coordinatro?

A Yes.

Q Were there anyone in that position as area coordinators?

A Yes, there were several people.

Q Could you name who they were and what areas they coordinated?

A Okay. There was Mr. Robert Cody, who was the

area coordinator for Buffalo. There was Mr. Ernesto Melendez who was the area coordinator for Long Island.

Q Will you give us periods of time on that, as best you can, to the best of your recollection?

A Buffalo, and Mr. Cody, I believe, was June of 1972 til September of the same year.

Again, this is as close as I can remember.

Q That's close enough.

A Long Island for Mr. Melendez, about the same time. There were others but I don't recall them.

Q John Marino, do you recall that name?

A John Marino was coordinator for Queens and Long Island for some time.

Q Were these people's position, area coordinators, below or under the position of National Director of Wholesale?

A Below or under --

Q Below or above, sorry.

A The position of --

Q National Director of Wholesale.

A Below.

Q Were these people receiving any override commissions of the sales derived from their individual areas?

A At certain times, yes.

Q What certain times were there?

A I believe Mr. Cody received a commission on the sales in his area of Buffalo, that was the entire time he was there. I think Mr. Melendez received a lesser commission of his area during the time that he was there.

Q How about Mr. John Marino, did he receive any commissions during the time that he was there?

A I believe he received one -- commissions on two separate occasions for one month.

MR. PADILLA: Again, the records will indicate that, your Honor, that's not totally accurate.

Q About Long Island, who took over the position of area coordinator of Long Island after Mr. Melendez?

A If you can't remember,neither can I.

THE COURT: Is it important?

MR. PADILLA: All these people did receive commissions from the total volume --

THE COURT: Is that the next question?

MR. PADILLA: After I get the name. I can't remember it myself.

THE WITNESS: Curtis Williams.

THE COURT: What?

THE WITNESS: Curtis Williams.

BY MR. PADILLA:

Q Did Mr. Williams receive any commissions for the total sales of Long Island while he was the area coordinator?

A I don't believe so.

Q You don't believe so or you know for a fact that he didn't?

A I don't know, in fact, almost anything that we have been talking about right now.

I'd have to refer tomuch more accurate records. This is the best of my recollection on all these things.

MR. PADILLA: Again, after lunch we will be going over that ledger quite thoroughly.

THE COURT: That's a good suggestion. It's one o'clock.

Are you saying they did and you are saying they didn't?

MR. PADILLA: I'm not saying they did, I'm only asking him whether he knows for a fact if they did. He has testified that some did and some didn't.

THE COURT: It would be very helpful, if it's important, to have it accurate on the basis of

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any record information.

MR. PADILLA: I feel so, your Honor, because I'm trying to show again in my own defense that there were many people receiving commissions from all over the place, and I really want to know how come I never got mine.

THE COURT: You were out working too hard.

MR. PADILLA: Maybe that was it.

THE COURT: You didn't come around and ask with your hand out.

MR. PADILLA: I'm going to feel that I was ripped off over there.

THE COURT: You had asked for 2:15,is that it?

MR. GOIDEL: YEs, sir.

THE COURT: All right.

(Luncheon recess.)

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ARTHUR LIEBERMAN, having previously been duly Sworn, resumed the stand and testified further as follows:

MR. GOIDEL: Your Honor, if I may, before Mr. Padilla commences his cross-examination again, I would like to offer in evidence the corporate books of Galaxy Foods, that is, the certificate of incorporation, the receipt from the Secretary of State, the Minutes Books, the Stock Certificate Book, and the Stock Transfer Books, which are all contained in this bound volume.

Would you like to see it, Gentlemen? I think yuu have already seen it.

MR. LERNER: Did Mr. Lieberman testify to recognizing it?

MR. GOIDEL: I will conduct a preliminary voir dire. May I interrupt for that purpose?

THE COURT: With Mr. Padilla's permission.

MR. PADILLA: It's all right with me.

VOIR DIRE EXAMINATION

BY MR. GOIDEL:

Q Would you look at these books?

A Yes.

Q Have you ever seen these books before?

A Yes, I have.

Q Would you identify them for us, please?

A This is the corporate records of Galaxy Foods as described by each one of the definitions that you gave a few seconds ago.

Q Were they maintained in the regular course of business of Galaxy Foods?

A Yes, they were.

MR. GOLDEL: I offer them in evidence.

MR. LERNER: No objection.

THE CLERK: So marked as Defendant's Exhibit in evidence.

(So marked.)

CROSS EXAMINATION

BY MR. PADILLA: (continued)

Q Mr. Lieberman, you testified before, when you mentioned the names, that there were many other people who had commissions in Galaxy Foods that were not ever named as defendants in this proceeding?

A That's correct.

Q You testified, I believe, that those were officers --

A Other officers, that's correct.

Q Were there also other people that were not officers, earning override commissions over the entire volume,

that were not named in this proceeding?

A That's correct.

Q Mr. Lee, during the presentations, you testified before that there were four speakers; in other words, three speakers, plus one guest speaker; is that correct?

A That's correct.

Q The guest speaker spot was normally done by one of the Board of Directors, the people named before, the Board of Directors, or Executive Officers, it was usually an officer of the company who did that part of the presentation?

A That's correct.

Q Was there any time when someone else might have done that part, other than an officer?

A Yes.

Q Can you tell me who and when, possibly, or to your best recollection?

A I believe there were occasions that Walter Martin did a guest spot. He is the only one I really can recall.

Q Do you recall Ernesto Melendez doing a guest spot?

A He was at the time an officer of Galaxy Foods.

Q Before that, when he came out of Advance Management School?

A Let me say this, there is a possibility he was

doing them in Long Island.

Q How about at the Golden Gate in Sheepshead Bay?

THE COURT: Who?

MR. PADILLA: Golden Gate Motor Inn in Sheepshead Bay.

A I don't recall.

Q Do you recall an Opportunity meeting right after the first group of men came back from the Advanced Management School, that some of them were given an opportunity to do a guest spot?

A I don't recall it.

Q Do you recall Robert Coady doing a guest spot after he finished his Advance Management School?

A I don't recall.

THE COURT: Excuse me just a moment. You mentioned Walter Martin. What was the name of the other gentleman?

MR. PADILLA: Ernesto Melendez.

THE COURT: Was he a guest --

MR. PADILLA: He doesn't recall. I will prove that.

A I said I don't recall. Again, Mr. Coady might have done guest spots in Buffalo. As a matter of fact --

MR. LERNER: I object to the answer. It is

pur speculation. Unless he can say he knows of his own knowledge, I would object.

THE COURT: That's right, Mr. Padilla, that is a rather sacred rule.

MR. PADILLA: I will buy that.

Q Do you recall a time came when during late 1972, when the officers of Galaxy Foods were not required for a while to attend the seminars?

A Which ones are you talking about?

Q Not the seminars, the Business Opportunity meetings?

A Mr. Padilla, I believe I testified already that they were never required to attend the Business Opportunity meetings, sir. Only to my knowledge, they were only required to attend Step-Up on Sunday. Many of them did, but they were not required to attend the Opportunity meetings.

Q Do you remember me speaking at any of the Opportunity meetings?

A Yes, of course.

Q What portion of the Opportunity meeting do you recall my narrating?

A I believe you were familiar with all of them. As far as I can remember, you did many portions of it. I saw you do one in Spanish.

Q Of course, this, or one similar to this, has been marked into evidence, which is the Galaxy Distributors Business Manual.

THE COURT: What is the Exhibit number on that?

THE WITNESS: That is Exhibit number 3, your Honor.

MR. PADILLA: I will refer to that one.

Q During the training, the Business Management training that was given by Galaxy to new Distributors coming into the business, was one of the requirements, one of the tests given to the new distributors, was for them to learn this book by heart?

A We told them that they should, yes.

Q In other words, did you ever tell them that if they want to get ahead in Galaxy Foods, if they want to ever seek a management position, that they should learn this books, become speakers, learn the individual parts, memorize it?

A Yes. One of the things that we said -- Perhaps we didn't phrase it exactly that way. Obviously, when you are dealing with 803 people, as we were, any amount of people at any amount of time, the only way you get to know people is if they are in attendance at Opportunity meetings; if you are there, you are in the fore, so to speak, on different occasions.

We did intimate to these people that one of the things, of course, that we noticed, the Executive and/or Corporate Officers, noticed, is people who speak at Opportunity meetings.

So we suggested to them that if they wanted to come to the fore, and were looking for perhaps positions in the company, that that was one of the places they could start.

Q Were Distributors who were speaking at the meetings, were they allowed at any time or in any way to deviate from any of the particular parts they were narrating from what is said in the book?

A I think we have already gone into that. They were not allowed to deviate.

Q So it was memorized, and had to be said as said in the book. Did I have anything to do with the preparation of this manual?

A You did not.

Q That takes care of that.

This is Exhibit 11, Plaintiff's Exhibit 11. This here, known as the Closing Book, which has already been gone into, what it contains, did I have anything to do with the preparation or any of the materials, or anything at all to do with this particular book, other than purchasing one for five bucks?

A May I see the book, Mr. Padilla, just to recheck and make sure there is nothing in Spanish in here?

You did not.

Q Again, I am going to refer back to the Business Manual book for one second, Plaintiff's Exhibit number 3, and where it says, Distributors' Association, where it states here, and I'd like to read this, if I may, this small portion, your Honor --

THE COURT: You want to ask him some questions about it?

MR. PADILLA: Yes. In other words, what I am trying --

THE COURT: It really isn't a good idea to read large portions of an Exhibit --

MR. PADILLA: From here to there.

THE COURT: I understand that. If you want to ask him questions, just take it step by step, and maybe extract what the meaning of it is, because the Court can read, if you call attention to the page.

MR. PADILLA: Page 6 of Plaintiff's Exhibit number 3, and the part headed under "Distributors' Association."

THE COURT: What do you want to ask him about, remember he has covered a lot of it, but if you have

something special -- You see, we don't want to go over the same ground, but something that pertains to your position in the case, or something that wasn't covered, you go ahead.

Q The Distributors' Association was formed in accordance with the Distributors' Business Manual, am I correct?

A Yes.

Q Whose idea was it to have a Distributors' Association?

A I believe Mr. Rosenthal and mine.

THE COURT: And yours?

THE WITNESS: Yes, your Honor.

Q Was the Distributors' Association supposed to be for any purpose, other than to run the meetings and pay for them, and work together to motivate each other, and things of that sort? Was it supposed to -- Was the Distributors' Association at any time supposed to be the type of a Union --

THE COURT: Wait a minute. Why don't you ask Mr. Lieberman, since he says he was the co-sponsor of the idea, what its purpose was?

Q What was the purpose of the Distributors' Association? I believe that that testimony was given before?

A Yes.

THE COURT: You wanted to improve it?

MR. PADILLA: Yes, to go into a different part of it, of what actually did happen.

THE COURT: What in particular, then, are you interested in?

MR. PADILLA: See, the Distributors' Association, your Honor, was formed more or less to --

THE COURT: I remember what the prior testimony was.

MR. PADILLA: The, eventually, within Galaxy Foods, there was some dissension, and the Distributors' Association did come to be more than just an association working with Galaxy, we formed together, in other words, to form sort of like a union, and that has not been brought out.

THE COURT: Against Management?

MR. PADILLA: Not necessarily against, but fighting certain policies.

THE COURT: All right. Ask him if he was aware of that, what he knows about it.

Q What do you know about what happened with the Distributors' Association, in your own words?

A Well, the Distributors' Association more or less disbanded in the latter part of 1972, and a new Association

was formed, called the Council, I believe it was called the Distributors' Council, and there was a Council President named Herb Foreman.

THE COURT: F-o-r-m-a-n.

THE WITNESS: F-o-r-e-m-a-n, and in Jury, and they brought forth certain suggestions.

We had on some occasions debates with the Association. One time -- With this new Association. I have testified once before that certain other people did come into the Executive Board meetings. There was a particular incident about 1 percent commission to the salesman, where the debate reached a point where we felt it would be necessary to call about -- I believe there was a dozen distributors -- into an Executive Board meeting to state their views.

Finally, rather than go their way, or go the way the Executive Board felt was necessary to maintain the business, we compromised, and reached a middle ground.

(continued on next page.)

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Q This new council that was formed, was I an officer of that council?

A I believe so, yes.

Q Were there ever any committee formed in that council called the negotiating committee?

A I cannot testify to the council, Mr. Padilla.

Q Did you personally ever meet with a negotiating committee from the council?

A That's the committee I just testified to.

Q It was called the negotiating committee?

A I didn't know the name of it.

Q Do you remember the people who made up this committee?

MR. GARMANSKY: Can we have a time period on this.

THE COURT: Was the new association formed right after the disbanding of the other?

THE WITNESS: That is correct.

MR. PADILLA: I would like to mark this as an exhibit.

THE CLERK: One-page document marked for Identification as Defendant's Exhibit K.

(So marked.)

THE COURT: Are you going to show it to the

witness to ask him if he is familiar with it?

MR. PADILLA: Sure.

THE COURT: Have you seen that before, Mr. Lieberman?

THE WITNESS: I have not seen this, your Honor.

THE COURT: Do you want to read it a minute and see if it refreshes your recollection as to anything you may know.

THE WITNESS: It has information on it that I am familiar with, but I have not seen this document.

THE COURT: I see. So you are familiar with the information that is reflected therein?

THE WITNESS: Yes.

THE COURT: What do you want to ask him about it?

BY MR. PADILLA:

Q This is the first election that the council held and these are the officers who got elected at that time the names of the officers.

THE COURT: What is it then, a minute?

MR. PADILLA: A minute of that meeting, of the first election that was held and who the officers were that were elected into different offices of the council.

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MR. LERNER: Your Honor, we just feel he should limit his description to the document and not indicate the circumstances which surrounded it, unless the witness can testify to it.

We have been sort of restrained in objecting to these things because he is not represented.

THE COURT: I don't think you are suffering any prejudice, I wouldn't want you to.

Are you in disagreement with his characterization as a minute of the --

MR. GARMANSKY: Yes, we are, your Honor. It does not appear to be a minute. It doesn't speak of anything about elections or anything else, there is no date on it. It is only a chart, an organizational chart with specific titles under it.

I don't know how these people were appointed or if there was a meeting at all for this.

THE COURT: Then, not having seen it, I didn't realize it, I thought it was sort of a --

MR. GARMANSKY: Here it is, your Honor (handing to the Court).

It is a handwritten organizational chart.

THE COURT: What do you want to bring out, Mr. Padilla?

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MR. PADILLA: After the Galaxy Foods, Inc. disbanded the association, because they were --

THE COURT: I understand that, a new organization was formed and this was --

MR. PADILLA: And that was -- those were the officers of that organization, of which I was one of the steering committee of that organization.

THE COURT: What is the particular point you wish to develop with this? What is it with this witness that would have some relevancy to your position?

MR. PADILLA: It will show as I continue, your Honor, because there was a time that came when the council had to even obtain counsel to represent the council -- we had to obtain an attorney.

THE COURT: Legal counsel.

MR. PADILLA: Legal counsel to represent the council of Galaxy Distributors, and we went through many transactions with the company trying to stop --

THE COURT: All right. You want to ask Mr. Lieberman about those.

MR. PADILLA: He knows about those things, yes. I mean I want to ask him about them.

THE COURT: Do they have relevance to your

position in this action? What would they contribute to my knowledge of the case?

MR. PADILLA: If I am being charged over here with fraud at one time, I believe that intent has got to be proven, that I did anything -- that if I did anything I did it with intent to do fraud.

If I was acting in a way at the beginning because I believed in the program and then towards the end when I saw that things were not going the way that they should, if I went out there and became a fighter together with the other distributors in leading them in to fight to try to save whatever we had of our investments and of our idea, this is again what I am trying to bring out in this.

THE COURT: Let me ask you this, I understand the problems you have, but, approximately, are any of these people available to you to be called as witnesses here?

MR. PADILLA: Yes, they will be available.

THE COURT: Wouldn't it be better to call someone like Mr. Foreman, for example?

MR. PADILLA: I would say, I think only if it

answering some questions.

THE COURT: Do you have any objection? I know it is somewhat beyond the scope of, I suppose, possibly, beyond the scope of the direct examination, but why don't we let him --

MR. GARMANSKY: If the witness has direct knowledge of this, that's fine. But --

THE COURT: I will try to make sure that that is so.

MR. GARMANSKY: Again though, this particular line of questioning --

THE COURT: Here is what -- as I recall, so far the witness has testified to the formation of this council and to the attendance of, I suppose, some of its representatives at Executive Board meetings.

THE WITNESS: That's correct, your Honor.

THE COURT: Where certain, perhaps, policy matters were under consideration.

THE WITNESS: That's correct.

THE COURT: Or offered for discussion.

THE WITNESS: That's correct.

THE COURT: And these representatives of the council appeared for the purpose of, one might say, taking a position with respect to the distributors

of Galaxy.

THE WITNESS: That's correct, your Honor.

THE COURT: And in at least one instance I think I heard you testify that that resulted in a compromise. Was that on this commission rate or something else?

THE WITNESS: It was on several items that were all packaged together into one thing which we put under the heading of one percent commission to salesmen in perpetuity.

THE COURT: Mr. Padilla, I don't mean to take over your right of cross-examination here --

MR. PADILLA: You are doing a good job.

THE COURT: I shouldn't be doing a good job for any party. I am supposed to be neutral.

Is there anything else that you want to bring out now of that order from this witness while he is on the stand which you say has a bearing on this overall role you say you played?

MR. PADILLA: Yes, there is.

THE COURT: Let me see, have we decided this is in evidence or not in evidence?

MR. GARMANSKY: I hope he has not offered it in evidence yet because we will object to the introduction

of it.

THE COURT: You would object to the introduction of it? Well, at the moment it is an exhibit fo identification.

Do you want to use it in talking to the witnes

MR. PADILLA: Sure.

THE COURT: Try to, as I say, focus on matters specific matters that you believe this witness might know, either because you were there at the time and he was there at the time, if that is what you are directing your attention to.

MR. PADILLA: O.K.

BY MR. PADILLA:

Q Mr. Lieberman, will you look at this document and tell me if you recognize it.

A Yes, I do.

Q What is it?

A This is a letter to me from Kunstler, Kunstler & Hyman, attorneys, notifying me that they represent the International Council of Galaxy Distributors and they are noticing me that since we are proposing radical changes on February 27, 1973, to the marketing plan, that they request that no changes be made until they had time to consult us about the changes and find out what they were. It is

signed -- it's not signed, but the typed in name on the bottom is Michael J. Kunstler, and that's what it is.

MR. PADILLA: Your Honor, I'd like to offer this.

THE COURT: Have it marked for Identification.

THE CLERK: One-page document marked for Identification as Defendant's Exhibit L.

(So marked.)

THE COURT: Who was that letter addressed to, by the way?

THE WITNESS: Addressed to Arthur Lieberman, Chairman of the Board of Galaxy Foods.

THE COURT: To you?

THE WITNESS: Yes.

MR. PADILLA: Your Honor, I have another document here that I --

THE COURT: Get it marked for identification.

MR. PADILLA: I want to say, I don't know exactly how to bring this about. This is the document that was made --

THE COURT: Ask the Clerk to mark it next in order.

MR. LERNER: We don't have any objection.

MR. PADILLA: No objection?

THE CLERK: Two-page document --

THE COURT: Show it to Mr. Goidel. You are proposing to offer that in evidence, isn't that right?

MR. PADILLA: Yes.

THE COURT: The chart is not in yet.

MR. PADILLA: No, I will get to that.

THE COURT: No objection? He has no objection. Do you want to ask the witness something, or have it marked for identification?

MR.PADILLA: Marked in evidence first, your Honor.

THE COURT: If it is marked in evidence you can read it. Let me say this, there is no use in filling up the record.

MR. PADILLA: No, I know what I have intentions of doing.

THE COURT: I will read it myself from the original.

THE CLERK: Exhibit L now marked in Evidence.

(So marked.)

THE CLERK: Two-page document marked for Identification as Defendant's Exhibit M.

(So marked.)

THE COURT: We have not heard about that one.

MR. PADILLA: No, your Honor. That was a third one.

THE COURT: All right. Have it marked. Each one separate or is that one exhibit?

MR. PADILLA: Three pieces of paper stapled together.

THE COURT: All right.

THE CLERK: This will be marked Defendant's Exhibit N, like Nathan, marked for Identification.

(So marked.)

JB fols.

MR. LERNER: No objection.

THE COURT: Show it to Mr. Goidel.

MR. GARMANSKY: Is he offering it in evidence?

THE COURT: The first letter was, as I understand it, addressed --

MR. PADILLA: It's one of the others. It's all together.

THE COURT: It's addressed to Mr. Lieberman --

MR. LERNER: That one is not addressed to the --

THE COURT: All right. Which one are we talking about now? M? Or is this M?

MR. PADILLA: This particular one here, yes.

THE CLERK: The last one was N.

MR. GARMANSKY: To keep the record straight, I am nolding N. Mr. Lieberman is now reading M as in Mary.

THE COURT: Did that exhibit M for identification ever come to your attention?

THE WITNESS: This is the first time I have seen it.

THE COURT: All right. Okay. I saw an N.

MR. PADILLA: Do you want to examine this document?

MR. GOIDEL: What is this?

MR. PADILLA: This is the preamble to the Constitution.

MR. GOIDEL: No.

THE COURT: Of this council?

THE COURT: Is that what it is?

MR. PADILLA: Yes.

THE COURT: What is N? Has Mr. Lieberman seen N?

THE WITNESS: I have seen N.

THE COURT: M, you have.

THE WITNESS: Yes, M.

THE COURT: how about N?

THE WITNESS: I am just looking at it.

THE COURT: All right.

Q All right, Mr. Lieberman --

THE COURT: Which one are you going to question him about?

MR. PADILLA: My Exhibit L.

THE COURT: L. That's the letter.

MR. PADILLA: The letter.

THE COURT: All right.

Q Mr. Lieberman, when you first received this letter, what actually if any action did you take?

A Nothing.

Since the radical changes that the letter referred to never came about --

Q Were there any meetings with the members or the people who -- let's forget that.

MR. PADILLA: This Exhibit M, your Honor, is the agreement made between the firm of Kuntzler and Kuntzler and Hyman and the steering committee. What it was at that time -- because there is the constitutional -- the council was not in effect. The steering committee and the -- in here it's got the signatures of --

THE COURT: Well, what you are really saying is that it's the retainer agreement?

MR. PADILLA: Right. The ten per cent. I just want to show --

THE COURT: That's M.

MR. PADILLA: That's N.

THE COURT: N.

MR. GARMANSKY: M as in Mary.

MR. PADILLA: M as in Mary.

THE COURT: All right. Well now, this witness, of course, would not be privy to that and has indicated he has never seen it before today.

I forget, but did somebody -- did somebody

say they had no objection to it going in?

MR. LERNER: We have an objection.

THE COURT: You do have an objection?

MR. GARMANSKY: Yes, your Honor.

THE COURT: I see.

MR. GARMANSKY: If I may --

MR. LERNER: Certainly with Mr. Padilla, if he wishes to take the stand, he can identify all these documents.

THE COURT: I suppose so. Why don't we pass that one by since the witness says he has never seen it before today?

I take it, that -- well, I'd better not take it.

Are you going to ask him some questions as to whether --

MR. PADILLA: Well, really, I just want to explain more or less what it is and what is the reason for the three of us -- since they are all -- since they all follow one another.

THE COURT: Yes. But I think at this point in time it's out of order at the very least. At some point I assume you are going to take the stand yourself.

MR. PADILLA: I have no intention to.

THE COURT: You have no intention to. Well, if -- you can think it over if you desire.

MR. PADILLA: I am having a hard enough time cross-examining witnesses. How am I going to cross-examine myself?

THE COURT: Well, I will examine you. I can do that, I suppose. Of course, it may expose you to cross-examination by the other counsel. But I don't think it's appropriate unless there is some -- unless something came about.

Mr. Lieberman has already said he did nothing with the Kuntzler letter because the changes never came about. You heard him say that.

MR. PADILLA: Yes, I heard him say that.

THE COURT: So, I take it that nothing was done about it and that there is not much point in pursuing it with this witness.

Was anything done with anybody else in Galaxy about that retainer? That is, was there anybody else?

MR. PADILLA: Well, what we did was we met with the Board of Directors.

THE COURT: You met with the Board of Directors.

MR. PADILLA: Right.

THE COURT: With counsel present?

MR. PADILLA: Not with the counsel present. Just what it is in the -- in the first one which is not --

THE COURT: Well, Mr. Lieberman has testified you did that. And that's what we have on the record, that you did meet --

MR. PADILLA: Well, what I want to do is find out who the rest of the people are who met with him from the council, which they are on my exhibit K.

THE COURT: We don't want to be too technical here, but at the same time it seems to me that these are matters that can be brought out through you and not through somebody else. Now, if you are going to have someone else from that counsel such as Mr. Foreman or whomever would be willing to come down here, you can do it that way. Or, as I say, you can take the stand, be sworn to tell the truth and some questions can be asked of you by the Court. And I suppose counsel for the Commission and for the Commission and for the defendants here may want to ask you questions, too.

Do you want to do that? That would be a more

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orderly and certainly regular way to put information in that you know about that may not be known by this witness.

MR. PADILLA: Yes, your Honor. But the information that I just want to make clear to the Court is what functions I took and what he knows about it as far as the council, what sort of an organization we were that he knows about. Because we dealt with him.

THE COURT: Well, I understand and I am perfectly willing to have you explore that further, although I thought I already pointed out that you did meet with the Executive Board and that certain matters were discussed and they resulted in a compromise which he says was sort of wrapped up in a package called the one percentage commission to salesman in perpetuity.

Was there some other bone of contention that you wanted to explore with him?

And what I mean by a bone of contention --

MR. PADILLA: There are a couple of items.

THE COURT: All right, go ahead. I am not trying to foreclose you on that.

Q Mr. Lieberman --

MR. GARMANSKY: Excuse me, one second.

Your Honor, defendant's Exhibit L is in evidence, I believe.

THE COURT: That is the Kuntzler letter. At least I believe that went into evidence.

THE CLERK: That is the only one that went in, L.

MR. PADILLA: That one is in evidence, too.

MR. GARMANSKY: No.

MR. PADILLA: Only the letter.

THE COURT: Do you want to show me that letter while you're talking? You can go ahead.

MR. PADILLA: In the meanwhile, can I have this clipped? Or do I have to wait? M and N.

MR. GARMANSKY: No.

MR. PADILLA: I cannot put it in evidence?

THE COURT: M is the retainer agreement with Kuntzler. No, that shouldn't be put in now.

What is N?

MR. PADILLA: N is the constitution of the International Council of Galaxy Distributors, which is the name of the organization, that was formed.

THE COURT: All right. Now, again, were you familiar with the council's constitution?

THE WITNESS: No, I was not, your Honor. I have never seen it.

THE COURT: You have never seen a copy of it?

THE WITNESS: Until just now.

THE COURT: Again, I think this is something that really should be reserved either for your own testimony, or if you can get somebody from the council such as Mr. Foreman or anyone else, you know, who you feel would be a responsible witness. You may do that. If you want to do it yourself, you can. We can ask you some questions.

MR. PADILLA: Very well. Okay.

Q Going back to the --

MR. PADILLA: Oh, you are reading that.

THE COURT: All right. Do you want this back now?

MR. PADILLA: Well, I don't.

THE COURT: All right, I have read it.

MR. PADILLA: Okay. Now, the first item which the witness has testified that he knows, he's never seen the document before, but he does know of the information in the document.

THE COURT: Well, first of all you might ask the witness whether he knows.

MR. PADILLA: He testified to that already.

THE COURT: The people who were listed on there -- you can ask him that question, does he know.

Q Do you know the people listed on that document?

THE COURT: Do you recognize any of those names?

THE WITNESS: Your Honor, I recognize all but Frederick Anderson. I would know them all by sight.

THE COURT: What would they be? Distributors?

THE WITNESS: They are distributors or field managers. I believe most of them are distributors, it would seem .

THE COURT: All right.

MR. LERNER: Your Honor, if the document is not in evidence, what is this -- who is the witness referring to?

THE COURT: Well, there are names listed on it and he knows all the people except one name.

MR. LERNER: I don't believe it's a proper question. He should ask whether if the document refreshes his recollection, and if the document refreshes his recollection he should be asked who the people are and he should identify them. We don't know who he is referring to.

THE COURT: Well, he has identified them as people who are either distributors or field managers.

MR. LERNER: Who is the --

THE COURT: What is your problem?

MR. LERNER: My problem is that when I read the record I won't know who the witness is referring to.

THE COURT: He is referring to defendant's Exhibit M for identification.

MR. LERNER: But that exhibit is not in evidence.

THE COURT: I understand. I understand it.

MR. GARMANSKY: I think it's Defendant's Exhibit K, your Honor, yes. It's not M. He's talking about K.

THE COURT: I beg your pardon. You are right. I am sorry. I misinformed you. It is K. It is K. I am sorry. So the reference should be Defendant's Exhibit K, then.

Well, you understand, even though it's not in evidence you can look at it to refresh your recollection.

Now, do you want to inquire about some meetings of this group?

MR. PADILLA: What I really want to do is

really get this document in evidence.

THE COURT: Well, the best -- you don't have to get it into evidence if you are going to ask him about, let's say, does he remember a meeting on such-and-such a date, and does he remember that X, Y and Z were there if they happen to be names on that list.

Do you understand? And if he says yes, you can get the testimony in on that verbal basis.

MR. PADILLA: Okay.

THE COURT: And he can use that even though it's not in evidence to refresh his recollection, provided it's something relevant to your position in this litigation.

MR. PADILLA: Yes. Only -- it is because -- like I said, I have the people who were involved in the counsel with me that I -- some of them I might be calling as witnesses if I can. You know, if I feel there is a need to. So that way it would then show the reason --

THE COURT: But I mean specifically what further do you wish to ask this witness about? Any dealings with the council of distributors?

MR. PADILLA: Well, meetings that we did have. And I believe it was more than one or two of them.

I am not sure. We did discuss more than the one per cent that was discussed before.

THE COURT: You may ask him whatever it is if it's important here in this case.

MR. PADILLA: I feel it is, your Honor.

(continued next page)

THE COURT: What does it relate to?

MR. PADILLA: Because it was -- it would show that is where I was saying my individual thinking as far as the distributors and the company went and in Galaxy Foods and where I was laying my loyalties, to who I was loyal. Whether it was the company, Galaxy Foods, whether it was the distributors.

THE COURT: All right, that is something in your mind. You think this witness would know what was in your mind?

MR. PADILLA: Well, he wouldn't know what is in my mind, but he's been involved in situations where I have been involved that -- where I have shown -- where I have expressed what was in my mind.

THE COURT: Well, you said there were one or two meetings and other subjects were discussed. Do you want to ask him about those other subjects?

MR. PADILLA: All right.

Q First, the meeting when you met with the negotiating committee of the Internal Council of Distributors, was that Thaddeus Stinson who was there?

THE COURT: Stinson?

THE WITNESS: I believe he was.

Q Was Herb Forman there?

A I believe he was.

Q Was I there?

A I believe you were.

Q You believe or do you know that I was there?

THE COURT: This was an executive board meeting?

MR. PADILLA: This was a meeting where we met with the Executive Board.

THE COURT: Yes, that's what I am saying.

MR. PADILLA: The Executive Board meeting.

THE WITNESS: To the best of my recollection, you were there.

Q Was Cranston King there?

A To the best of my recollection, he was there.

Q Tony Reale?

THE COURT: Let me see, you had four names. Stinson --

MR. PADILLA: King. The next one was Tony Reale.

THE WITNESS: To the best of my recollection, he was there.

Q Mr. James Gerard.

THE COURT: Is that G-e-r- --

THE WITNESS: I don't believe Mr. Gerard was there.

Q And Tom Casey?

THE COURT: Casey.

MR. PADILLA: Casey, yes.

THE WITNESS: To the best of my recollection, he was there.

Q Do you know what Mr. Casey's profession is?

A I believe he was an accountant.

Q At that time, at that meeting, did we ask -- or not really ask -- but demand to see the books of Galaxy Foods?

A I believe so.

Q What happened?

A You were refused.

Q Did we -- and again, at that time, what were we, this committee, speaking for? The distributors of Galaxy Foods?

A No.

Q We were speaking for the council of the distributors of Galaxy Foods?

A Yes.

Q Did we come to any agreement that Mr. Tom Casey, the accountant, would get a look at the books?

A I think we reached some sort of tentative agreement that if conditions could be worked out, that we had no objection to Mr. Casey looking at the books. And I believe we even stated that you could bring in an outside accountant to help Mr. Casey with the books.

Q Will you tell us why at that time you objected to this committee looking at the books of Galaxy Foods?

A It's obvious, George, that as far as the books and records of any private corporation, to my knowledge, are the property and the -- under the direct ownership of the shareholders and directors of that corporation and no outsider is permitted to look at those books unless granted permission.

Q Did you consider the distributors of Galaxy Foods outsiders?

A I did not consider them the directors and I did not consider them shareholders.

Q Did you consider them outsiders?

MR. GARMANSKY: Objection, your Honor. It's argumentative.

MR. PADILLA: He didn't answer my question, your Honor.

Q Tell me why you didn't --

MR. PADILLA: My question was whether he considered them outsiders. Originally he testified that outsiders are not supposed to be looking at the books. So I asked him --

THE COURT: Outsiders as contrasted with insiders? Is that the idea?

MR. PADILLA: Did he consider the distributors outsiders. Very simple question. Yes or no.

THE COURT: Well, it is argumentative, but I will allow it if the witness thinks he can answer it.

THE WITNESS: For the purpose of looking at books, George, I considered them outsiders.

Q Okay. All right. We will get away from this for a little while and go into a different area.

Do you recollect the day in Galaxy Foods known through Galaxy Foods as Black Friday?

MR. GARMANSKY: Can I have that read back?

THE COURT: Yes, I would like to have it read, too.

(Record read.)

THE WITNESS: I remember the expression, yes.

Q Okay. What occurred on Black Friday, if I

can refer to it as that day? What day was Black Friday?

A I believe it was March 15, 1973.

Q What occurred?

A That is my recollection.

Q It's close to it. I won't argue with it. It doesn't really make that much difference whether it was the 15th or 20th.

THE COURT: What happened?

Q What happened on that day?

A There was a -- we held a distributor meeting such as the ones I described with Mr. Goidel where policies were made and everything. And the distributors were told unless we raise a great deal of money in a very short time we would have to stop the wholesale, the retail operation of food. We would in effect close the doors of the warehouse.

We asked them -- we set up quotas for them. Franz Quack did this. Set up quotas for the amount of customers that we needed to keep the pilot program going.

We also told them to go out and sell the balance of our franchises. That was the purpose for the meeting, to try to get them to jump into some work.

However, I was asked what occurred. At a certain point in the meeting, a lady named Elinor Perez

stood up and said, "Why don't we all loan money to the company," or some words to that effect. A few other people picked it up and pretty soon we had a great deal of confusion.

When the confusion eventually subsided, we started telling them that that was not the purpose of calling the meeting. We appreciated the fact that they wanted to loan the company money, but we were more interested in them going out and working and causing the quotas that we had set for them to -- to come about and to be fulfilled. But before the meeting was over a committee was appointed by the -- by the distributors who were there -- I believe 400 to 500 distributors were there. A committee was appointed in order to collect funds which would be turned over to Galaxy Foods in the form of a loan. And the committee consisted of Thaddeus STinson, who was mentioned, Mr. George Padilla, Franz Quack and John Salano. They were two distributors, both who were on the council, and two executive officers of Galaxy Foods.

Subsequently I believe $30,000 was raised and given in to Galaxy Foods. Notes were given by the corporation to those individuals. And that's what happened.

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CROSS-EXAMINATION

BY MR. PADILLA: (Cont.)

Q All right now, you testified that from the distributors this committee was elected. Was there a vote? Let's talk about my case? Did I volunteer or did the people ask for me to be one of the members.

A I believe the people asked for you to be a member.

Q Steiner -- did theyask him?

A In order to save time, in each case these people were selected by the distributors.

Q The moneys collected came to approximately $30,000?

a I believe so.

Q What happened to this money?

A It was used to pay off the bills of Galaxy Food. The records will indicate what happened to it.

Q Among the contributors or the people who loaned money to Galaxy Foods, was I one of them?

A Definitely.

Q Do you remember the amount that I loaned Galaxy Foods at that time?

A No, I do not, George.

Q A thousand bucks, which I lost.

MR. LERNER: Could we have that stricken from the record?

THE COURT: Yes.

MR. GOIDEL: You could of course ask him to refresh his memory from that statement.

BY MR. PADILLA:

Q Could I refresh your memory, was it $1,000?

A I believe it was to the best of my recollection.

MR. PADILLA: Thank yon, Mr. Goidel.

Q Was that before or after Galaxy had met with the counsel, you know, with the negotiating committee of the international counsel of Galaxy Distributors?

A To the best of my recollection it was before. I don't know.

MR. LERNER: Could we have one answer?

THE WITNESS: I testified that it was before to the best of my recollection.

Q Let me refresh your recollection --

MR. LERNER: He answered the question.

MR. PADILLA: To the best of his recollection, he doesn't know for sure.

THE COURT: Is there something in writing that would refresh his memory?

MR. PADILLA: I am looking here to see if there is a statement.

THE COURT: Some event?

MR. PADILLA: Events there are, because we had met -- this happened more or less around March 15th, the black Friday?

A That's correct.

Q Do you remember the date that the negotiation committee met -- what month -- what month it was?

A That's my problem, I do not remember, George.

THE COURT: Let me ask you this:

Does the letter that is in evidence ofMr. Kuntsler help refresh his recollection?

MR. GARMANSKY: Exhibit L in evidence is dated.

THE COURT: Does that refresh your recollection in any respect?

THE WITNESS: No, your Honor.

Unfortunately, I do not remember who it was before -- after I received this letter --

THE COURT: Doesn't the body of the letter refer to a meeting on March the 2nd?

THE WITNESS: Yes, that was one of the distributor meetings that we were going to hold.

THE COURT: Which was held?

THE WITNESS: Yes, at which time those changes that I referred to in that letter were not made.

Q Isn't it a fact --

THE COURT: Obviously that meeting occurred prior to what you call black Friday.

THE WITNESS: Yes, your Honor.

THE COURT: About two weeks before?

THE WITNESS: Correct.

THE COURT: I guess Mr. Padilla is trying to find out whether it is still your recollection that the district counsel group didn't meet at the executive board before March the 15th.

THE WITNESS: That's what he is trying to find out.

THE COURT: You are unable to help him?

THE WITNESS: Correct, your Honor.

THE COURT: All right.

BY MR. PADILLA:

Q Isn't it a fact that the counsel met with you and other members of the executive board before the meeting of March the 2nd referred to here and the result of that discussion at that meeting was that the members of

the council were told "Don't worry about it."

We asked what would be discussed at the meeting and we were not told and you said "You will find out when you get to the meeting because the members of Galaxy Food had changed their plans to go through with the changes or the offices?"

A I don't understand. Areyou saying that you were never told that radical changes were going to be made and yet at a formal meeting --

Q No --

A You discussed it with us before?

Q Do you remember a letter sent out by Mr. Bruce Katz to all distributors?

THE COURT: That exhibit represents something sent to all distributors, doesn't it, saying that something was going to take place on March the 2nd?

THE WITNESS: It does not, your Honor.

THE COURT: "Since your notice indicates -- your notice."

THE WITNESS: I do not know what "notice" is.

THE COURT: Your notice is obviously a notification, a letter, a circular, a communication, that is the way a lawyer would regard it.

THE WITNESS: Okay. I will take it it means a letter.

Q Do you recall --

THE COURT: You do not have a copy of it?

MR. PADILLA: No.

Q Do you remember a letter sent, signed by Bruce Katz, to all the distributors explaining -- first of all calling together a meeting and saying in the letter that radical changes would take effect -- radical changes in the marketing concept of Galaxy Foods?

A I remember several letters that went out that said "radical changes."

Q Do you remember one prior to March the 2nd?

A Yes, I do.

Q Do you now remember a meeting with the council or with the committee before that meeting took place?

A Now I do.

Q You remember?

A Before the March 17th meeting or the March 15th meeting, whatever the date was, black Friday?

Q No, not before black Friday, before the meeting?

A The March 2nd?

Q Yes.

A That's correct.

Q Do you remember more or less what kind -- what kind of an attitude there was at this meeting between the officers of Galaxy Foods and the members of the council, were they friendly or were they in other words hostile towards one another?

A I don't remember.

Q Do you recollect that meeting at all -- do you remember that meeting at all?

A I remember a few people who were there, yes. I don't remember who -- what was discussed too well. I do remember that the reason that we had said radical changes were going to be made was because the attendance at our distributor meetings were falling off and the only way to make sure that people would be present is if we told them that radical changes were to be made. Two weeks later we had to accomplish the meeting of March 15th or whatever date it was that which we were going to accomplish at the meeting of March 2nd -- let people know that we had to go out and work.

Q Whenever you spoke at a business opportunity meeting, you were the guest speaker -- the fourth speaker?

A There were times when I put on the program.

Q How many times did you put on the program --

THE COURT: Mr. Padilla, are you going to go over old ground?

MR. PADILLA: It is not really old ground.

THE COURT: All right.

Q The times when you were the guest speaker, was part of that -- a portion of your part an answer and question period?

A Yes.

Q Was ever the question asked to you at that time, you know, I really like this program and I want to get into it, but I don't have any money, how do I get the money? Was ever a question similar to that form asked to you?

A Yes, it was.

Q What was your answer to that?

A I said to see the sponsoring distributor.

Q Was there ever any time when people would under the same question say: "Yeah, but how do you get it -- how do you get money?"

Did you ever give any other answer other than "See your sponsoring distributor?"

Did you ever explain to people how they get money?

A I believe once -- one time because we had somebody who was rather dumpy a bit I broke down to him ways of obtaining money.

Q Can you mention those ways?

A Yes, personal loans, insurance, money that might be collected on insurance, selling anything of value, things of that nature.

Q Did you ever say to anyone at any time that if they want for a personal loan -- during this meeting -- if they want for a personal loan people will ask what I should put the money down for and you said "Putthat you want it for something else other than Galaxy, otherwise it will take too long for the money to come through?"

A I did not.

Q I would like to remind you that you are under oath.

Mr. Lieberman, during the period when Galaxy was going through its pains at the beginning of 1973 -- problems that it was having financially and during the time the distributors were lending money to the company -- Galaxy Foods -- were you constantly telling all of us that within two weeks -- that you were talking to backers who were going to invest $350,000 into Galaxy Foods?

A I did not say he was going to invest anything.

Q Did you mention that you were talking to backers who were thinking of investing $350,000 into Galaxy Foods?

A Definitely.

Q Yes?

A Yes.

Q Was this used as incentive by the officers of the company to keep distributors, that this money was coming in that everything would be saved, so they would lend the money?

A It was used as the truth. That's all it was used as. People were concerned, we were concerned. I told the truth.

Q As far as you know, Mr. Lieberman, was I ever a party in Galaxy Foods to any -- giving any misleading information other than information given to me through you or one of the other officers?

A Would you repeat the question, please?

Q Did you ever --

A Wait, I'd rather hear the reporter repeat it.

(Record read.)

MR. GARMANSKY: I do not understand the question either. Maybe Mr. Padilla could rephrase the question to make it clearer.

MR. PADILLA: I will try to rephrase it and make it clearer. I beg your pardon, counsel, I am from the hills of Puerto Rico.

BY MR. PADILLA:

Q Let me again ask:

Do you at any time -- did you at any time hear me make -- let's put it this way:

Was I ever in a policy-making position at Galaxy Foods?

A No.

Q Did I ever try to --

THE COURT: Ask him was he present at any meeting where you were a speaker.

Q Before that testimony came up, at his first examination by the plaintiff, he said no --

MR. GARMANSKY: He said he was present when you spoke.

MR. PADILLA: Again the record will speak for itself.

THE COURT: If you are interested, you may ask him did it ever come to his attention that you made any representations to people, whether they be distributors or franchisers or prospects or what, that differed in any way from the script.

Q Did it ever come to your attention that I at any time made any representations to anyone connected with Galaxy Foods that differed from the scripts or from what I was taught either at training school or meetings or what?

MR. GUSRAE: I object to that question. This man is still a party to this action. I do not know what this man was taught. I have no idea what he learned. He has testified. He has not explained it. I have no idea what that question means.

MR. GOIDEL: I think he wants to rephrase the question.

MR. PADILLA: I will rephrase the question.

Q Mr. Lieberman, did you ever hear me make any statements to anyone in Galaxy Foods contrary -- did you ever hear me make any statements to anyone about the Galaxy Food operation?

A No, I did not.

Q Mr. Lieberman, you testified here before that it was the wish or the intention of Galaxy Foods that every distributor -- once a retail operation got started -- would set up its own office and work out of that office?

Do you know of any distributors that did that?

A Yes, I know of a few.

Q Would you mention that?

A George Padilla, Steven Roth. I can't think of any others offhand. I know you did.

THE COURT: How about Shevack?

THE WITNESS: No, your Honor.

Q Did you ever have a chance to visit my office?

A Yes, I did.

Q Would you describe what kind of operation went on in my office?

A Downstairs there was a rather large meeting room where you held meetings for all the Spanish-speaking distributors. I don't know if that was your office.

Q It was rented by the council.

A But there were meetings. That's how I managed to come upstairs, there was a Spanish-smeeting there and I came up to your office and we discussed the business of the company and you showed me a film that you had prepared at the office and that was about it.

Q You made mention of a film.

This film was -- what was this film about?

A About Galaxy Foods in general, the retail operation.

Q You said again.

Did it show anything about wholesale?

A Not to the best of my recollection.

Q Again, your Honor, the film that he just brought up I intend to bring that in as an exhibit.

THE COURT: You are going to show it?

MR. PADILLA: Certainly. You will get an opportunity to see the entire operation of Galaxy Food.

THE COURT: Do you have a projector?

MR. PADILLA: I was going to ask the Court for an 8 milimeter or Super 8 with a screen. I don't have a projector.

MR. GOIDEL: We will volunteer to make one available.

MR. PADILLA: Thank you, Mr. Goidel.

(Continued on next page.)

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CROSS-EXAMINATION

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BY MR. PADILLA: (Cont.)

Q You mentioned before Spanish meetings, Spanish meetings were held. Who ran these meetings?

A The meetings were run jointly, to the best of my knowledge, by you, Mr. Vinga (phonetic), Joe Vega, and Mr. Mendez. Later on they were run by Mr. Mendez and Mr. Santa Maria, something like that.

Q Would you give me a more specific time period, for how long of the time was I involved with the running of this meeting, to the best of your knowledge?

A For quite a length of time, I would say one year, almost from the time you came into the business until you started working in the council, about that time.

Q Isn't it a fact, Mr. Lieberman, that the first Spanish -- do you recall when the first Spanish meeting was held?

A I'm sorry, I do not.

Q Does the Month of July of 1972 sound like it could be it?

A I would say that sounded about the right time.

Q Isn't it a fact that on about October 18, when I resigned as director of wholesale, I at that time stopped attending all meetings and --

A All meetings that I knew of, yes.

Q So the time would be between July and October that I was involved with the meetings?

A You're talking about Spanish meetings?

Q Spanish meetings.

A I thought that you held Spanish meetings after that while working out of your office.

Q Spanish meetings were held, but they were held by Mr., as you mentioned, Mr. Vega, Mendez and --

MR. LERNER: They appear to be having a conversation and that's not the purpose of cross-examination.

THE COURT: Mr. Lerner, I can't do anything about it until you call my attention to it.

MR. LERNER: I move to strike Mr. Padilla's remarks because he appears to be correcting the witness' answer.

THE COURT: As he says, he comes from the hills of Puerto Rico --

MR. LERNER: From what I understand, he did all right on the streets of Brooklyn, too.

THE COURT: It appears that way.

I am perfectly willing to give you some liberal area of cross-examination, Mr. Padilla, but

it would be more helpful if we can keep the verbiage down in this written record to what really matters, and while I am sure there are many things that seem important to you, and I can understand it, nevertheless, the Court has to be concerned with focusing on facts which bear directly on issues here.

I recognize one of the issues concerns your role and position vis a vis Galaxy, I understand that. But how far are you going to be carrying it?

MR. PADILLA: Not very much longer, not on this particular topic.

THE COURT: You mean you haven't run out of topics?

MR. PADILLA: No, I still got one or two more left.

MR. GOIDEL: If I may request a five-minute adjournment, I would also at that time like to confer with Mr. Padilla, who is representing himself.

THE COURT: I was going to run for five-minutes longer and break at 10 of 4 until 4 o'clock and give you a ten-minute adjournment.

MR. PADILLA: Would you read back my last statement.

(Record read.)

THE COURT: I will grant that motion largely because I don't see the relevancy of it. We know that you were active in the Spanish community. I am unable to see where this adds anything of help to you or to the Court.

MR. PADILLA: Your Honor, I can show you that. I just went to show that there are other people very actively involved also with the Spanish community, also working, who may work --

THE COURT: Why don't you come right out with it. You are asking, I suppose, why Vega and Mendez and Santa Maria are not involved in this case.

MR. PADILLA: Correct.

THE COURT: This witness can't give you that answer. You have to direct that question to Messrs. Garmansky and Lerner.

MR. PADILLA: But of course they are not on the stand.

THE COURT: But you can't use him as your whipping boy. He didn't start this law suit, you know that.

MR. PADILLA: I am well aware of it. However,

he can give information which would, you know, show, since this man held the highest position in Galaxy Foods, if anyone was aware of what was going on in Galaxy Foods, it was Mr. Arty Lee.

THE COURT: Mr. Padilla, with all due respect to what I consider a very keen intellect and understanding, this witness is not going to be able to explain why you are in and the others are out. I understand what you are driving at, you are trying to show that these people were also active in the things you did, and I take it one of the things you did was develop your contacts with the Spanish community and so forth. Now, that's clear to me.

What else is there that others did that you did, if that's your point, what else would there be?

MR. PADILLA: Like I said, there were other people running the Spanish meetings, there were other people in charge of training Spanish -- I never did that, but there were others who were in there training Spanish distributors, who came in, who didn't speak English, which I was not involved with, and there were others running meetings for Spanish distributors, company meetings, company type meetings where the officers were not there, or if they were

there, they were there not as speakers because they were running meetings with these Spanish distributors which I was not involved with.

THE COURT: You could ask, in addition to the names of Vega and Mendez and Santa Maria --

MR. PADILLA: I believe it is Sanabria.

THE COURT: In addition to those three and yourself, are there others who played an important part? You might ask this witness if he knows that.

MR. PADILLA: Fine.

BY MR. PADILLA:

Q Besides Mr. Vega, Mr. Mendez, Mr. Sanabria, were there any other Spanish distributors or Spanish speaking persons in Galaxy who took an important part in working with these Spanish distributors in Galaxy, Spanish field managers?

A - Yes, there were.

Q Would you name them?

A IF I can. There was Angel Gonzalez, there was -- did I mention Mr. Vega, Joe Vega?

THE COURT: Yes, you mentioned him.

THE WITNESS: There was --

THE COURT: Melendez?

THE WITNESS: Yes, Bernie Melendez. There was

several people --

THE COURT: Oporto (phonetic)?

MR. PADILLA: She never even went to a meeting.

THE WITNESS: There were several people who slipped my mind, your Honor, who were working in the warehouse who were Spanish-speaking people: George Carbonel.

THE COURT: Yes.

THE WITNESS: He was working in the warehouse. There was another fellow, Lou -- your Honor, it's been some time and --

THE COURT: All right.

THE WITNESS: There were many, your Honor, Spanish-speaking people.

THE COURT: We don't expect you to have the memory of a computer. All right.

MR. PADILLA: Are you ready to dismiss now for the ten minutes?

THE COURT: Yes. I see a unanimous consent on that.

(Recess.)

BY MR. PADILLA:

Q Mr. Lee, before you testified up to September

1st, I believe, of 1972, you gave six names of who were the six top earners in Galaxy Foods up to that time, is that correct?

A That's correct.

Q But throughout the entire period that Galaxy Foods was in existence, do you know of any one or any number of people in Galaxy Foods, distributors working the wholesale end of Galaxy Foods, who earned large quantities of money, say $20,000 or more?

A Yes.

Q Could you name some of those for me?

A I believe my testimony is already in on that. I didn't refresh my recollection on any further ones. I added Mr. Ralph Stewart, Mr. Frank Johnson. There were others. I can't remember all of them.

Q How many distributors in Galaxy Foods were there, would you say, to the best of your recollection, that earned $20,000 or more?

A $20,000?

Q $20,000 or more?

A 20.

Q At least 20.

Would it have been more than 20?

A Could have been.

Q Could it have been less than 20?

A I don't believe so.

MR. PADILLA: I have no further questions now, your Honor.

THE COURT: Is there to be any redirect examination?

MR. GARMANSKY: Yes, your Honor.

(Pause.)

REDIRECT EXAMINATION

BY MR. GARMANSKY:

Q Mr. Lieberman, do you know whether or not Mr. Padilla made any suggestions to you pertaining to the wholesale operations of Galaxy?

A I imagine he did. To the best of my knowledge, he did, yes.

Q That is the answer, to the best of your recollection he did?

A Yes.

Q Would you please tell us what some of those suggestions were?

A Well, Mr. Padilla was in charge of meetings at the time, as far as organization was concerned, and he made some suggestions as to organization at the meetings; most of the time he wasn't speaking to me, he was speaking

to his direct superior who I believe was Steve Roth, but he did make suggestions, I don't recall exactly --

MR. PADILLA: I object to that. I want to know if in speaking to Steven Roth, did I do that in his presence, did he hear me?

THE COURT: Were you personally present to hear these remarks?

THE WITNESS: Not all of them, your Honor, but a few, basically pertaining to meetings, dress --

MR. PADILLA: I'd like to have a time, please, date and place.

(Continued on next page.)

JB

THE COURT: Well, I think --

MR. GARMANSKY: Let the witness answer the question and we will get the time and the place.

MR. PADILLA: Can we have the place.

THE COURT: Mr. Lieberman, I think it's best if you try to keep in mind that we want to keep hearsay out of this. If you were present and something was said by Mr. Padilla, we will permit you to talk about that. And as Mr. Padilla suggested, Mr. Padilla requested that you try to make it specific in point of time and place.

THE WITNESS: All right, your Honor. It was during the time that Mr. Padilla was in charge of the wholesale operations, the national directors of wholesale. And at times I would arrive at the meeting and he would come up to me and say, I thikn we ought to, for instance, make it clear to some of those people that they should -- this was Franz Quack -- that this is a business meeting and I think we ought to start exactly on time instead of a quarter after the hour. That sort of thing.

BY MR. GARMANSKY:

Q Mr. Lieberman, did you ever hear Mr. Padilla's name mentioned at the opportunity meetings?

A Yes.

Q In what connection did you hear Mr. Padilla's name mentioned at the opportunity meetings?

MR. GOIDEL: Objection.

MR. PADILLA: I object.

MR. GARMANSKY: May we have the grounds, please.

MR. GOIDEL: Yes. It would be hearsay.

THE COURT: Are you assuming that Mr. Padilla was present.

MR. GARMANSKY: All right.

Q Mr. Lieberman, was Mr. Padilla present at these opportunity meetings when you heard his name mentioned?

A On some occasions, yes.

Q Mr. Lieberman, do you recall who said Mr. Padilla's name?

A I said it on occasions. Mr. Katz said it. Mr. Roth said it. Mr. Horowitz said it.

Q Will you please tell us what yourself and the other individuals you mentioned said concerning Mr. Padilla?

MR. GOIDEL: Objection. He may certainly speak for what he said, but he cannot say what a

third person said.

THE COURT: I think that's a meritorious objection.

MR. GARMANSKY: This is similar to the Katz colloquy the other day. Anyway -- all right.

BY MR. GARMANSKY:

Q Mr. Lieberman, what did you say about Mr. Padilla?

A We were talking how many different people from varied walks of life had come to Galaxy, some of whom had earned a great deal of money. In one of those instances we cited that Mr. Padilla was a New York City Policeman and we had cited that he earned a great deal of money in Galaxy.

Q Was the amount of money ever mentioned?

A I don't believe the exact -- or even approximation of the amount of money was mentioned by myself. No. Kept changing.

Q Was Mr. Padilla termed as a big earner or a big hitter in Galaxy, Mr. Lieberman?

A I never heard the expression, big hitter in my entire life.

Q How about big earner?

A Big earner. All right. That's -- something

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to that effect, yes. Big earner.

Q Now, Mr. Lieberman, what was the purpose of mentioning Mr. Padilla's name at the opportunity meeting as having earned a lot of money in Galaxy?

A I thought I stated that. To show that Mr. Padilla had come as a policeman, who knew nothing about sales, and to demonstrate to the others that if they joined Galaxy Foods, that they too regardless of their background might become big earners.

Q Now, Mr. Lieberman, at the opportunity meeting you testified the figure of $60,000 was mentioned; is that correct?

A That's correct.

Q You also testified that figures less than $60,000 were mentioned; is that correct?

A That's correct.

Q Now, at the opportunity and your Sunday step-up meetings, was there any figures larger than $60,000 mentioned?

A At the Sunday step-up meetings?

Q What were those figures?

A I don't remember exactly what they were or even an approximation. They were based on figures that had come up to us from the protective investor in the --

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Q Just give me the end figure, Mr. Lieberman, the resultant figure.

A I don't remember what they were.

Q Would it refresh your recollection if I told you a quarter of a million dollars?

A Possibly.

Q How about $125,000?

MR. GOIDEL: I object to this, your Honor, unless it's established that what Mr. Garmansky is endeavoring to do is elicit facts as to what this witness purportedly said. If it's going to be a statement which he is trying to get in through the back door as to what some third person said, I think that should be established at this time.

THE COURT: Will you please read back a few questions and answers.

(Record read.)

THE COURT: Well, is the import of your answer that these came from people in the audience, these figures.

THE WITNESS: That's correct, your Honor.

THE COURT: Would they -- they were based on computations from figures that people in the audience gave.

THE WITNESS: The end resultant figure was not one that came from the audience.

THE COURT: When you say based on computations, I'm not too clear. You mean they sat there themselves and worked over some kind of data and came up with a number.

THE WITNESS: That's correct.

Your Honor, if I may explain. We used to ask them -- we said to them, now we have shown you how you can earn money in Galaxy Foods. We'd like you to try to figure out how much you think you can earn. And we used to ask them in a year's time how many salesmen did they think they could hire. They would give us a number.

Then we'd ask them how many customers did they think each one of these salesmen could acquire in a year's time. They gave us a number. We did some multiplication and we got to a total amount of customers acquired through their organization.

And then we asked them if they thought $25 was a fair amount to say each one spent each week. They said, yes.

We said, all right, assuming this customer -- these customers order this much, $25 a week, that

would give you a weekly figure of X thousands of dollars. At your commission of 4 percent, let's say, as a distributor -- and we used this as an assumptive. We assumed all along that they were distributors. And you would be earning 4 percent override on the reorders of food. And 4 percent of -- let's say the figure was $250,000 a week or whatever it may be, it might be $10,000 a week, which would mean that if you can continue this for a year, you can earn half a million dollars.

But it was all based on figures that they had presented. And then, of course, we lowered the figures.

THE COURT: What would have been the source data of the figures that they used.

THE WITNESS: Just their imagination, your Honor. It wasn't -- we asked them, would it be a -- a person would say, for instance, I think I can hire five salesman a month.

THE COURT: All of this was before the pilot retail program got into effect.

THE WITNESS: No, your Honor. This was -- this step-up procedure continued at all times.

THE COURT: At all times.

THE WITNESS: That's correct.

THE COURT: But I mean what you related was said before a pilot program was put into operation? Was some you might say hard data.

THE WITNESS: No.

THE COURT: Accumulative.

THE WITNESS: I think we are missing the point. This was speculation coming from prospective investors as to work they might be able to perform. And the -- that's all that really was. It was part of the selling program or the program to get these people to buy franchises. And it was speculation. We asked them these questions.

THE COURT: Stimulative speculation.

THE WITNESS: I would say that if the figure that Mr. Garmansky said, $250,000 -- it might not have been that figure. It might have been $223,500 a year or something like that. But if that figure was indeed proposed, I would say it was -- it would be deemed stimulation speculation for a year's earning.

I did put those figures on the board, the larger figures. So I can testify to that, to what I put on the board.

BY MR. GARMANSKY:

Q Now, Mr. Lieberman, you testified to various expenditures of money by Galaxy for setting up a retail operation. Now, do you recall testifying that Galaxy was going to spend 60 -- $60,000 on the computer?

A I said 160,000, if I remember correctly.

Q Fine. This is the lease of the computer?

A That's the full term of the lease of the computer, yes.

Q How about the program? How much money was to be spent for the program?

A $60,000 for --

Q How much did Galaxy in effect spend for the program?

A I do not know.

Q Was it more than $10,000?

A I do not know.

Q You have absolutely no recollection?

A I do not have a recollection.

Q Do you have a recollection of the time in which money was or could have been spent for the program for the computer?

A I believe we put some money down on the programming prior to receiving the computer itself. That

would be the latter part of '72. And we made a few payments in '73. But I -- it would have to be within that period, that time period.

Q Do you recall whether or not you paid the full $60,000?

A I am fairly sure we did not.

Q Now, Mr. Lieberman, when did Galaxy receive the computer physically in the warehouse?

A In January of 1973.

Q What particular date in January, sir?

A I don't remember the particular date.

Q Now, the pilot program began -- started when?

A November 27th, 1972.

Q Now, was the computer used at all for the pilot program?

A No. It was being programmed. It was not used.

Q So, therefore, the computer was not in use for the pilot program?

A That's correct.

Q Now, Mr. Lieberman, how many salesmen were there in Galaxy at the end of 1972?

A I don't understand the question. By salesmen --

Q I will explain the question.

You had testified that field managers and distributors could obtain salesmen for their own organization in order to obtain customers for the retail foods services. How many salesmen were there associated with field managers who distributed at the end of 1972?

A I have no way of knowing.

Q Do you know whether or not there were any at the end of '72?

A Yes. I definitely know there were many.

Q Now, Mr. Lieberman, you have testified that you heard Mr. Kirsch speak at training sessions; is that correct?

A Yes.

Q Now, did you see Mr. Kirsch arrive just for that portion of his presentation at the training sessions or was he there earlier?

A He arrived just for that portion of the training session.

Q Did he -- did Mr. Kirsch leave immediately after his presentation was over?

A Sometimes he did not leave the premises, but he left the training itself.

Q The training room?

A The training room or the training session might not have been in separate rooms. He might have gone to the back.

Q Now, Mr. Lieberman, did the executive board ever receive any recommendations from Mr. Kirsch on the expenditures of money for food?

A Yes.

Q Did the executive board have any discussion over these recommendations submitted by Mr. Kirsch?

A Yes.

Q Do you know whether or not at any time in any executive board meeting the directors, yourself, Mr. Avni, Mr. Rosenthal, later Mr. Horowitz, left the executive board meeting to reach a decision by themselves and came back to the executive board meeting and announce that decision?

A Yes. It happened on occasions.

Q For what purpose?

A Announcement of promotions, things that I specified that the board of directors did that or the executive board did not do.

Q Just for those purposes?

A That's correct.

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Q Now, were there any discussions in the executive board concerning the -- strike that question.

Mr. Lieberman, did the board of directors ever reach any decision by themselves concerning wholesale -- the wholesaling policy of Galaxy without the benefit of the executive board?

MR. GOIDEL: I object to the form.

THE COURT: Will you read it back, please?

(record read.)

MR. GOIDEL: The words "without the benefit of the exeuctive board," may carry a myriad of sins or meaning, your Honor.

THE COURT: I'll sustain the question -- the objection as to form.

MR. GARMANSKY: I will rephrase the question.

Q Concerning the -- strike that.

Did the board of directors ever discuss the policy of wholesale -- the sale of franchises outside of the knowledge of the executive board?

A Yes. I have so testified.

Q Were any decisions concerning wholesale -- the wholesaling policy ever reached without talking first to the executive board?

A Yes.

Q What type of -- what decisions were they?

A Well, of course, the preparation of the manual, which I have alluded to before, the setting up of opportunity presentation, the establishment of the speakers at these presentations. And many other changes that came about were reached with the aid perhaps of the executive vice president in charge of field operations, but not at an executive board meeting.

Q Mr. Lieberman, did the board of directors ever have any discussions concerning improper spending or use of funds by the -- Mirsch?

A Improper spending or use of funds?

Q This is the board of directors.

A Could you define what you mean by improper spending or use of funds?

Q Yes.

That the board of directors discussed that Mr. Kirsch was not allocating the money properly or buying wisely or inadequately or in too much quantity, things of that nature.

A Yes, they did.

Q What was discussed?

A On several occasions we thought that Mr. Kirsch had purchased too much of one product, that we were

overstocked with it.

I can point out directly in the case of cigarettes and icecream, two particular products. We did have a discussion with him about that.

Q Did Mr. Kirsch have to tell anyone what he was buying?

A Well, yes, he had to tell the executive board what he was buying. But not piece by piece and not -- in other words, he said this week I'm spending $45,000 to get a group of items or a group of products from Brazzuto in Connecticut and I am buying -- I'm placing 350 items into this order, and they should be catalogued in such and such a place; they should be on such and such a shelf.

But he did not have to list each product and say how much he was spending on each, although I am sure he maintained those lists because he told me he did in his office.

Q Now, you testified that Kirsch brought in Mr. Cody, Robert Cody.

A That's correct.

Q He sponsored Mr. Cody in the business?

A That's correct.

Q Now, do you know whether or not Mr. Kirsch had knowledge that Mr. Cody received -- or that the District

Attorney of Brooklyn was making inquiries concerning Mr. Cody?

MR. GOIDEL: Objection, your Honor.

MR. GARMANSKY: I asked the witness if he has knowledge of that fact, your Honor.

MR. GOIDEL: Number 1, your Honor, as I understand redirect examination, it is to pick up on such matters as I have alaborated upon or Mr. Padilla has elaborated on. It is not to introduce a new matter in the first instance which apparently this is. That's point number 1.

Point 2, there is such an innuendo involved which can be communicated from the question itself as possibly to be prejudicial in this trial.

Thirdly, what Mr. Kirsch knows or believed is something which should have been properly asked of Mr. Kirsch, not of this witness as to whether he knows what Mr. Kirsch knew about somebody else.

THE COURT: I will sustain the objection.

I think that's getting a little beyond the area of relevancy also.

Q Now, Mr. Lieberman, you testified that you were first aware of an SEC investigation into Galaxy Foods, Inc., in March 1973; is that correct?

A I said I believe that that's when we received the first subpoena from the SEC to produce documents and records.

Q Mr. Lieberman, could it have been earlier than March 1973 when the SEC began it's investigation of Galaxy?

THE COURT: Well, to your knowledge.

THE WITNESS: I believe the first subpoena I saw in my records recently was March '73.

(Cont'd on next page.)

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REDIRECT EXAMINATION

BY MR. GARMANSKY: (Cont.)

Q Mr. Lieberman, are you equating a subpoena with the start of an investigation?

A That's when we first received notification --

Q Fine.

Don't --

MR. GARMANSKY: Your Honor, I believe the witness may be confused in this matter if he's equating the subpoena with a start of the investigation.

I want to get at --

Q Who was Galaxy Foods attorney at the time that you heard about an SEC investigation?

A Mr. Ralph Brosan.

Q Do you know when the first time Mr. Brosan said to you that the SEC was looking for -- words to that effect, the SEC was looking into Galaxy?

A I believe it was in the early part of 1973. Whether it was March or January, I'm not sure.

Q Mr. Lieberman, you testified to the distinction between the corporate officer versus the executive board officer; is that correct?

A That is correct.

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Q Now, you testified that there were veto powers held by the corporate officers over the executive board; is that correct?

A I believe I did, yes.

Q Were these veto powers ever used?

A On rare occasions. Not very often.

Q Do you recall any of these occasions?

A Yes.

Q Please tell the Court what those occasions were.

A As pertaining to the reduction of the francise sales from 1,079 to 900.

THE COURT: Say that again.

THE WITNESS: Reduction of the franchise sales from 1,079 to 900.

Q Any other times?

MR. GOIDEL: In order to fully understand that, may we understand what it was that the executive board wanted and what it was that was vetoed?

Which one wanted the 900?

THE WITNESS: The --

Q Was there a discussion among the executive board members concerning the reduction of the franchise from 1079 to 900?

A Yes, there was.

Q What was discussed?

A Well, the people who were involved with the -- there was a discussion as to whether or not to reduce the quota from 900 -- from 1,079 to 900, whether or not it would supply the corporation with enough money to proceed with the business of Galaxy Foods and to get the retail into operation.

Q Was there a bote taken at the executive board meeting on this one issue?

A Yes, there was.

Q What was the outcome of that vote?

A The outcome of the vote was, a decision was reached, I don't remember the exact count, a decision was reached to put it up to the distributors at a warehouse meeting, or a distributors meeting, and then to reevaluate.

THE COURT: That was by the executive board?

THE WITNESS: That was by the executive board.

Q Was the issue then discussed by the Board of Directors?

A Not at that time. We waited until the vote came back.

Q The vote from whom?

A The distributors.

Q What was the vote from the distributors?

A It was in favor of reducing the quota. Then we debated it once more.

Do you wish me to continue, Mr. Garmansky?

Q Yes.

A We debated once more and we were still pretty much split on whether or not to do it. There were a few people who thought that by reducing the quota at that time that it might, although it might help our credibility a little bit and reach our quota much faster so we could go on with the business of retailing that we might be left short of money.

The Board was split, the Board of directors went outside of the meeting, I believe it was at that time -- at that time it was Mr. Horowitz, myself, Mr. Avni, we discussed it, we came back in and said we are going to make the deciding vote,at this time we don't feel that a reduction in the quota is called for.

Q When was this, Mr. Lieberman?

A If the letters which have been introduced as evidence could refresh my recollection I could tell you when this was.

THE COURT; That package by Katz?

THE WITNESS: That's correct. It should be dated.

MR. GARMANSKY: There is no date.

It was the winter of 1972. Or late spring, in any event, November of 1972, would be my best guess, best estimate.

May I look at that?

THE COURT: I think you mean fall, don't you?

THE WITNESS: Yes, I'm sorry, fall, November. I can't testify to any better recollection that that.

BY MR. GARMANSKY:

Q Mr. Lieberman, when did the Department of Consumer Affairs commence their investigation of Galaxy? If you know?

A In September of 1972.

Q September of 1972.

Was Mr. Kirsch still part of the executive board?

A Yes.

Q Was there any discussions among the members of the executive board concerning the Department of Consumer Affairs investigation of Galaxy at that time?

A Of course.

Q What was discussed?

MR. GUSRAE: I'm going to object to that. I see no relevancy at all to the issues c. this case, what was discussed about the Department of Consumer Affairs.

THE COURT: When did this come up before, was it on your cross-examination?

MR. GOIDEL: That's correct, sir.

MR. GUSRAE: It may be for a different purpose, but to ask --

THE COURT: Since it was gone into on cross-examination, I suppose it's a legitimate topic for exploration on redirect.

MR. GOIDEL: For the record, your Honor, I would like to state, I have absolutely no objection to going into this issue.

MR. GUSRAE: I can't see how --

THE COURT: I can't foreclose Commission counsel from inquiry on redirect to something that was opened up on cross-examination.

I will say myself, I am not altogether clear as to the relevancy of this particular inquiry, even by Mr. Goidel.

MR. GOIDEL: Well, your Honor, if I may remind

the Court, I brought it up in context of whether or not there were opinions received from counsel throughout a certain period of time as to the propriety of certain acts.

THE COURT: On the issue of good faith.

MR. GOIDEL: That's correct.

MR. GUSRAE: This is quite different, your Honor. He's asking about what discussions were held at executive board meetings regarding investigation by the Department of Consumer Affairs .

I don't see how that relates at all to this case. Plus the fact --

THE COURT: Let me put it this way, as Mr. Goidel has reminded me, his inquiry related to the subject of consultations with counsel for the purposes of getting opinions and so forth and this bears upon asserted good faith of the parties involved, I don't see why the Commission can't explore aspects of it which might tend to place the good faith contention in a different perspective.

MR. GUSRAE: I would like to remind the Court that there is a case pending that was brought by the Department, Mr. Lieberman has testified about it, but that case is pending. Although, it's been

pending for quite a long time, and nothing might never happen --

THE COURT: You don't want to create a record here which might be detrimental to your client's position over there.

MR. GUSRAE: That's my only concern.

THE COURT: Well --

MR. GARMANSKY: At the time of the discussions though, your Honor --

THE COURT: Let me ask you this: How far do you intend to penetrate this subject?

MR. GARMANSKY: I am not going to go into it deeply, your Honor.

THE COURT: What is it you want to really find out?

MR. GARMANSKY: I want to find out what the defendant Kirsch said concerning this investigation if anything at all, did he make any inquiries after that on anything.

MR. GUSRAE: On that particular question I would withdraw my objection. It's just the pending question that I object to.

THE COURT: Let's see where we stand. Your testimony up to now is that Mr. Kirsch was still on

the executive board in September '72 --

MR. GARMANSKY: I'm asking -- I asked were there any executive board meetings concerning the Department's investigation.

The answer was yes.

THE COURT: There were meetings?

THE WITNESS: I thought you asked was it discussed at executive board meetings, not whether there were any special meetings.

THE COURT: In other words, they discussed this at one or more meetings or several meetings?

THE COURT: All right.

BY MR. GARMANSKY:

Q Was Mr. Kirsch present for these discussions?

A Yes, he was.

THE COURT: Then?

Q Would you briefly tell us what was discussed at these executive board meetings concerning the Department of Consumer Affairs investigation?

MR. GUSRAE: That is my objection. That's exactly where we were before. I don't object if he wants to talk about particularly Mr. Kirsch, thought I don't understand the relevancy, but I don't want to be in a position in any manner, shape

or form to prejudice my situation with the Department of Consumer Affairs.

I don't see how it relates to this --

THE COURT: Are you suggesting that the witness take the Fifth?

MR. GUSRAE: I am suggesting that that question is totally irrelevant to the particular issues in this case.

THE COURT: Except as I say, Mr. Goidel made an issue about good faith reliance upon opinions of counsel, that the occurence of this investigation didn't appear to have or create any cause for concern on the part of the Galaxy officials or whatever, regarding the character of their operation or dealings.

But I can't see how I can foreclose Mr. Garmansky from bringing out from this witness anything which might tend to place that good faith contention in a different perspective.

MR. GUSRAE: Why doesn't Mr. Garmansky ask particularly what was said regarding opinion letters or whatever, but to just open up the dam --

THE COURT: I see what you mean --

MR. GUSRAE:--is just --

THE COURT: Why don't we limit it for the moment so we can feel out way along a little bit.

You asked for discussions. I don't remember what the prior testimony was, but it seemed to me that there was either consultation or some report by counsel, I don't know which.

Isn't that true?

MR. GOIDEL: Correct.

THE COURT: Did counsel ever come to know of any of these meetings, by the way?

THE WITNESS: He did.

THE COURT: Did he come inconnection with this particular City investigation?

THE WITNESS: Yes, he did, your Honor. It wasn't to an executive board meeting, it was to a meeting of the distributor.

THE COURT: That's not what we are talking about.

THE WITNESS: I understand.

THE COURT: So then I will overrule the objection, subject to your right to renew it.

Do you recall the nature of the discussion?

THE WITNESS: Certainly do, your Honor.

THE COURT: Let's hear what you have to say.

THE WITNESS: We discussed at the executive board meeting whether or not we should take any action insofar as the fact that we had been notified that the department of Consumer Affairs was investigating us.

It was mutually decided by everybody that until something further developed we should do nothing. However, if any attack was made on our credibility either to the distributors, to our prospective customers, we would then press for it with an action against the Department of Consumer Affairs for illegally restraining our trade and violating our civil rights.

BY MR. GARMANSKY:

Q Did Mr. Kirsch agree with this policy?

A It wasn't our policy as such. We had consulted with an attorney first, of course, and he told us that they were allowed to conduct any investigation they wanted to and that's what we notified the executive board about. The decision as far as pressing an action against the Department of Consumer Affairs should something come about was just thrown out and everybody said, that's right, that's what we will do.

YEs, Mr. Kirsch took part in that decision.

Q Mr. Lieberman, you have testified that a check would always accompany an application for a field manager or a distributor; is that correct, the application form, a check will always accompany that application form?

A When a person is coming into the business, right.

Q Now, Mr. Lieberman, if that check accompanying the application form is entered on the books and records of Galaxy, does that mean that the application has been approved?

A I would imagine, yes.

Q Do you know?

A To the best of my knowledge, yes.

Q Now, when that application, the field manager-distributor application, has been accepted, does the person immediately become a franchisee in Galaxy?

A Yes.

Q I'm going to show the witness what has been received in evidence as Defendant's Exhibit G. I am showing him the first page under the cash receipts for November 1971.

Mr. Lieberman, does that first page of the cash receipt ledger of Galazy for November 1971 reflect

any monies received from Mr. Paul DeCeglie?

A It does.

Q Now, does that receipt of money indicate that Mr. DeCeglie was a field manager?

A I would imagine that it does, yes.

MR. GOIDEL: Objection. Either he does or does not.

THE WITNESS: To my best recollection it does yes.

Q Now, Mr. Lieberman, do you know where Mr. DeCeglie resided at the time he paid Galaxy $1000?

MR. GOIDEL: Objection.

Where he lived is of no materiality whatsoever.

MR. GARMANSKY: It is of very material import, your Honor, because Mr. Goidel brought up that all securities were only sold to residents of New York State. It is a defense, your Honor, to have just an intra-state offering which does not have to be registered with the Commission.

It is our contention, your Honor, that that exemption is lost because of offers and sales to people outside of the State of New York who were not New York residents.

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MR. GOIDEL: ONly if the sale takes place outsiee of the State of New York, and it does not matter that a person may reside, -- you can have 32 different residences, that is not what establishes interstate commerce.

MR. GARMANSKY: Interstate commerce is established by many means --

MR. GOIDEL: If a contract is --

THE COURT: Wait a minute. I know you have come on a point which has been troubling me here. Let's get the facts of this to the best of this witness' recollection.

THE WITNESS: To the best of my recollection, your Honor, in response to the question, Mr. DeCeglie was a resident of New York State.

BY MR. GARMANSKY:

Q Isn't it a fact, Mr. Lieberman, Mr. DeCeglie was a resident of New Jersey?

MR. GOIDEL: Objection, argumentative. He's your own witness, I withdraw the objection.

THE WITNESS: Does that mean I have to answer the question? I've already testified that to the best of my knowledge this man was a resident of New York State.

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Q He wasa resident of New York State to the best of your knowledge?

A That's correct.

Q Mr. Lieberman, do you know whether or not Mr.DeCeglie received a refund from Galaxy for the purchase of his field manager position?

A No, I do not know.

Q You have no knowledge of that?

A I don't remember. It's possible. We refunded many.

THE COURT: Let me ask you this: Is there no way ofknowing for certain who your distributors and field men actually were at some point?

THE WITNESS: Yes, your Honor. We had all the applications and agreement forms of Galaxy Foods which were subpoenaed and received by the Commission. They have had possession of it. Knowing that they have this material, they would know if Mr. DeCeglie was a resident of New Jersey or New York, or anybody else, your Honor.

THE COURT: So it's the actual agreement forms, is that it?

BY MR. GARMANSKY:

Q Mr. Lieberman, I'm showing you again

Defendant's Exhibit G, I am opening up to the cash disbursement page for May 1972 under the date of May 3rd.

There are two entries under that date for checks payable to Paul DeCeglie in the amount of $600 and $400.

THE COURT: What was the date?

MR. GARMANSKY: May 3rd, your Honor, 1972.

THE COURT: Check for how much?

MR. GARMANSKY: Two checks, your Honor, $600 and $400.

Q Mr. Lieberman, do you know what thepurpose of those checks were?

A To the best of my recollection or knowledge, it was return of the $1000 he had given into Galaxy.

Q Now, Mr. Lieberman, is your memory refreshed that Mr. DeCeglie was given his money back?

A Apparently he was, yes.

Q Now, do you know for what purpose Mr.DeCeglie was given his money back?

A I haven't got the vaguest notion. He might have asked for it back.

THE COURT: Is there much more?

MR. LERNER: I move that the witness' last

statement be struck from the record.

If the Court would instruct him not to volunteer.

THE COURT: All right.

THE WITNESS: I thought it was responsive to my last answer.

THE COURT: Was there a pending question?

MR. GARMANSKY: No, your Honor.

THE COURT: All right.

Mr. Lieberman, don't volunteer. Wait until a question is asked.

THE WITNESS: Sorry, your Honor.

THE COURT: I am willing to have you finish this, Mr. Garmansky, I wanted to discuss something with counsel.

MR. GARMANSKY: Your Honor, plaintiff has no more redirect.

THE COURT: Then you may stand down, Mr. Lieberman.

(Witness excused.)

THE COURT: This last interrogation has brought something that I was going to discuss with counsel in a preliminary way, which has been

troubling me to some extent. I know that jurisdiction is predicated here on the Securities Act and in particular it would appear Section 77E and various subdivisions.

It was the fact that this morning there was this testimony I think about all distributors being residents of New York, or all applicants being required to be residents of New York, that stimulated the thought in my mind what really is the jurisdictional basis here.

MR. LERNER: Your Honor, we intend to prove, as we have laid the groundwork a few moment ago, that at least one resident outside the State of New York was offered and/or sold one of these franchises.

THE COURT: Let me ask you this: Are you referring to this particular individual who got his money back?

MR. LERNER: That's correct.

We intend to put him on the stand to testify that he was a New Jersey resident at the time and that Galaxy was aware of the fact. It only takes one offer or sale to destroy the exemption, your Honor.

Your Honor, furthermore, I think testimony has already indicated this, the very nature by which the distributors and the franchise holders in Galaxy prospected individuals, that is, by approaching them on the street, and in one case by throwing -- by, we will prove, by throwing a flyer to a person --

MR. GOIDEL: I am going to object to this repeated elaboration as to what they were going to show as though it is testimony.

THE COURT: Mr. Goidel, don't get excited about that. As I say, we are simply discussing what seemed to me to be a problem and it had occurred to me independently before this question of the DeCeglie transaction was mentioned that if we were dealing with a purely intrastate offering where was Federal jurisdiction?

MR. LERNER: Your Honor, there still would be Federal jurisdiction because I believe we have shown that the mails and other means of interstate commerce have been used here, so even if the security itself didn't have to be registered, it doesn't exempt the defendants from the application of the anti-fraud provisions and they could still be found to have violated those sections, so in any event,

21 the Court would have jurisdiction of this matter.

Section 10B(5) does not fall because there is an interstate exemption. Or Rule 10B(5), your Honor.

THE COURT: When you say the use of the mails, in what way?

MR. LERNER: I believe we have -- there has been testimony that circulars or other material emanating from the company has been mailed out, number one, --

MR. GOIDEL: There is no such testimony, your Honor.

MR. LERNER: Secondly, newspaper advertisements were used, your Honor, by newspapers which would circulate outside the state.

MR. GOIDEL: That ad, your Honor, specifically limits the offer to New York State residents. I am only responding in this fashion --

THE COURT: I understand.

MR. LERNER: Telephones were used, telephone calls. We will have witnesses on the stand to the extent that they placed phone calls with certain of the defendants to find out where meetings were taking place and who they should speak to when they arrived at the meetings.

22 This information that hasn't already been developed will be developed. That is, of course, in addition to the fact that we will have on the stand a New Jersey resident who will testify that he was offered and sold one of these franchises.

If Mr. Goidel's statement is accurate that no statements -- no testimony has been made with respect to the mails, the Commission at this time would like to recall Mr. Lieberman and we would ask him those one or two questions as to whether mails were in fact used in connection with the Galaxy --

THE COURT: All right.

(Witness Lieberman resumes the stand.)

REDIRECT EXAMINATION

BY MR. LERNER: (Cont.)

Q Mr. Lieberman, with respect to the wholesale end of Galaxy's program, that is the solicitation -- that is the sponsoring in of potential investors, into the Galaxy meetins, to your knowledge, were the phones ever used to contact these potential investors?

A By Galaxy Foods, Inc..

Q By the officers or directors of Galaxy Foods, Inc. or by the distributors of Galaxy Foods, Inc.?

MR. GOIDEL: Objection. He cannot speak for a distributor.

THE COURT: No, I won't permit him to speak for a distributor here.

Q Can you speak for yourself?

A Did I ever contact a prospective investor as an officer?

THE COURT: Yes.

THE WITNESS: No, I didn't.

Q Do you know whether Mr. Kirsch did?

MR. GOIDEL: Objection. He cannot speak for Mr. Kirsch.

MR. LERNER: He certainly can. It would be an admission against interest --

MR. GOIDEL: Only if Mr. Kirsch told him so or unless he witnessed the phone call, but he cannot otherwise speak for Mr. Kirsch.

THE COURT: Did you ever witness Mr. Kirsch doing so?

THE WITNESS: No, your Honor, I didn't.

THE COURT: Did he ever tell you that he had spoken to someone on the telephone regarding coming into Galaxy?

THE WITNESS: No, your Honor, he didn't.

BY MR. LERNER:

Q Do you know whether or not any of the defendants in this action used the phones to call up

potential investors?

A I do not know that for a fact, no.

Q Do you know whether any -- whether the mails were used by any of the defendants inthis action?

A To contact prospective --

Q Investors?

A -- investors?

Q Yes.

A I didn't. And I don't know for a fact whether anybody else did.

THE COURT: Let me ask you one thing, Mr. Lieberman, while I think of it, this ad, this newspaper ad -- I believe that's what it is?

THE WITNESS: Yes, your Honor.

THE COURT: Was that the only newspaper ad that was run?

THE WITNESS: That was the only newspaper ad ever run by Galaxy Foods, Inc..

I'm sure that the distributors, as independent --

THE COURT: Wait a minute, you say you are sure?

THE WITNESS: I have seen other ads put out by distributors themselves.

THE COURT: I see.

In newspapers of general circulation?

THE WITNESS: Mostly in local newspapers, because they couldn't afford the advertising rates of the larger papers.

THE COURT: By local newspapers, do you mean community type newspapers?

THE WITNESS: That's correct.

THE COURT: Such as The Flatbush Bugle or something of that sort?

THE WITNESS: That's correct, your Honor.

BY MR. LERNER:

Q Did you ever see any advertisements in newspapers yourself?

A Yes, I did. I just testified to that.

Q That you saw them?

A Yes.

Q Did each advertisement that you saw specifically state that Galaxy's franchises were limited to New York State residents?

A No, they didn't. They didn't specifically state that.

Q Do you recall the newspapers in which these advertisements appeared?

A I just testified that they were all local newspapers. First of all, we refused the ability to place ads in any of the larger newspapers.

Q Isn't it a fact, that you placed the ad which is part of the Plaintiff's Exhibits in the Daily News?

A That was the last ad we were ever allowed to place in the Daily News.

Q Were there usuallly phone numbers given in these newspaper advertisements?

A Yes, there were.

Q The name of the distributor or field manager was also placed in the advertisements?

A Sometimes.

Q With respect to the applications, do you know whether any of these applications were ever mailed out?

A On occasion they were. Mailed out?

Q Mailed out to people who were prepared to sign up.

A No, not to people who were prepared to sign up. On occasion they were mailed out after they had been submitted to us.

Q You mean a copy of it was mailed out?

A That's correct. The distributor's copy was

mailed out on occasion when we could not get somebody in. That was after it was approved, of course.

MR. LERNER: Your Honor, I submit we have satisfied the interstate commerce requirement.

MR. GOIDEL: Your Honor, I can speak for an hour --

MR. LERNER: One second, please.

I think the pertinent question of law is whether the mails and other means of interstate commerce were used in connection with the purchase or sale of a security. And I think that's been established. The "In connection with" and the Haight v. Watson case has been used broadly and I think it's been used broadly on this case.

MR. GOIDEL: Shall I speak on this subject now or shall I hold it?

THE COURT: It would be most usual -- incidentally, I wish to interject an answer to your question. I think it would be difficult for me to rearrange matters that I have on tomorrow and I certainly wouldn't want to bring you back here on a piecemeal basis, so we will go over to Monday.

I would like to have a memorandum from each side here on this question with the best you can turn

up in the way of cases. I recognize that the Commission has a lot going for it in prior law in terms of liberal interpretation of these statutes in order to assist the Commission carry out its important responsibility.

On the other hand, if it is true that there was but one transaction with a New Jersey resident which later came to naught, there would be a question in my mind as to whether the Court should really carry on with this case but leave it rather to the State Law Enforcement authorities.

MR. LERNER: Your Honor, Mr. DeCeglie was in the organization from November to May. That's a period of close to six months. We are not talking about a person who was in one day and out the next.

THE COURT: I think I'd have to be satisfied that the proof was going to demonstrate that it was known that he was indeed a bonafide resident of New Jersey but even so, as I say, if this hinges on one transaction I have some real reservations about this.

MR. GOIDEL: In addition, your Honor, if I can just interject for a moment. It's not merely alone a question as to whether somebody has a

residence in another state. The question arises as to where the transaction took place.

MR. LERNER: Where the transaction took place is immaterial, your Honor.

We will brief the point. We will have Mr. DeCeglie here and not withstanding the fact that this was an intrastate transaction, the fraud provisions as alleged will continue to apply to an intrastate sale of a security as well as it would to an interstate and we will be glad to brief that point for your Honor as well.

THE COURT: When were you planning to have DeCeglie come here?

MR. LERNER: Monday.

THE COURT: It might be a good idea.

See you on Monday.

(Case adjourned to Monday, October 7, 1974, at 10:00 o'clock a.m.)

* * * *

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I N D E X

WITNESSES	Direct	Cross	Redirect	Recross	Voir Dire
Arthur Lieberman	547	659	721		658

* * * *

EXHIBITS	Description	For ID.	Into EV.
For the Defendants			
F	Various Documents		569
G	Books		604
H	Document	634	
I	Orders		652
J	Corporate Records		659
K	Document	669	
L	Document	677	678
M	2 Page Document	678	
N	3 Page Document	679	

* * * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

SECURITIES EXCHANGE COMMISSION,

Plaintiff,

-against-

GALAXY FOODS, et al.,

Defendants.

73-C-1742

United States Courthouse
Brooklyn, New York

October 7, 1974
10:50 o'clock A.M.

B e f o r e :

HONORABLE EDWARD R. NEAHER, U.S.D.J.

GENE RUDOLPH
OFFICIAL COURT REPORTER

Appearances:

ALLAN LERNER, ESQ.
HARRY GARMANSKY, ESQ.
REGINA MYSLIWIEC, ESQ.
JULIA WILLIAMS, ESQ.
Attorneys for SEC

ALVIN GOIDEL, ESQ.
Attorney for Defendants Sheback and Kirschenblatt

GEORGE PADILLA
Pro Se

THE COURT: Good morning.

MR. LERNER: Good morning, your Honor.

Your Honor, on Thursday when we adjourned, you requested that the parties brief certain matters relating to the jurisdictional basis on which this lawsuit is brought; namele, the question of the intra-state exemption, the question of interstate commerce, and we also briefed the question of whether the Ford provisions apply notwithstanding the exemption, and we have that brief, your Honor.

THE COURT: All right. Fine.

MR. LERNER: Let the record also show that we have served the brief on Mr. Goidel and Mr. Padilla.

THE COURT: All right.

MR. GOIDEL: Your Honor, I apologize to the Court for not having our brief ready. My office is researching the problem and they are preparing a brief, but we have not as yet been able to conclude our work.

THE COURT: Well, I will take judicial notice of the fact that you do not have the resources of the SEC.

MR. GOIDEL: Thank you, your Honor.

MR. LERNER: Your Honor, we worked this weekend.

THE COURT: I know.

MR. LERNER: Your Honor --

THE COURT: That is why you are in the Government service.

MR. LERNER: Underpaid and overworked.

THE COURT: Eager beaver. Underpaid and overworked, right.

MR. LERNER: Your Honor, Mr. Goidel has reserved the right to call Mr. Lieberman to the stand with respect to two documents, I believe.

On Thursday I had, more or less, extemporaneously called Mr. Lieberman to the stand to explain certain -- what I felt to be certain areas of jurisdictional questions and over the weekend I have come across some newly discovered evidence which was not in our hands prior to the commencement of this action, nor during the commencement of this action.

I think it would be useful for Mr. Lieberman to again take the stand for that limited purpose, to explain those items.

MR. GOIDEL: Your Honor, I have no objection.

THE COURT: All right.

MR. LERNER: Thank you.

THE COURT: You may resume the stand, Mr. Lieberman.

MR. LERNER: I might make one other statement.

I represented to the Court on Thursday that I would have Mr. DeSiglia in Court today. I interviewed Mr. DeSiglia again, and due to prior commitments he will not be able to appear until tomorrow, if that's all right with the Court.

THE COURT: All right.

MR. LERNER: Thank you.

A R T H U R J . L I E B E R M A N , having been previously duly sworn by the Clerk of the Court, resumed the witness stand and testified further as follows:

REDIRECT EXAMINATION

BY MR. LERNER:

Q Mr. Lieberman, do you recall on Thursday, last Thursday, I had recalled you to the stand in an attempt to lay certain foundations, with respect to the use of interstate commerce by Galaxy Foods?

A I do recall that.

Q Now, I asked you on Thursday last whether the newspaper article which had been previously marked Plaintiff's Exhibit? You recall the article, that one that was in the Daily News?

A That's correct.

Q Whether that article had appeared, and whether it was in a paper of general circulation; do you recall

those questions?

A Yes.

Q I believe your answer was yes, that it was the only article that had appeared?

Since that time I have come across some additional articles. I'd like to have you look at them and ask you if you could identify them for the Court.

MR. GOIDEL: Your Honor, I will object to the question, only to the extent that counsel has stated that the witness stated that that was the only article. I don't believe that was the witness' testimony.

I believe the witness stated that was the only advertisement that he knew of in a newspaper of general circulation but that there were other local newspapers in which some advertisements had been placed. I believe that was the tenor of his testimony.

MR. LERNER: Your Honor, whatever his testimony was, the record will stand. I don't think it's important for the purposes of these questions.

BY MR. LERNER:

Q Mr. Lieberman, my first question to you is, did Exhibit, Plaintiff's Exhibit 7, appear in the Daily News?

A Yes, it did.

Q On how many different occasions did it appear

in that paper, to the best of your knowledge?

A I believe at the time that it had been two, but now that I see that there are -- the same ad is in the Daily News here in front of me three times, I would have to say three is the answer.

MR. LERNER: All right. I'd like to mark as Plaintiff's Exhibit -- what number?

THE CLERK: 14.

MR. LERNER: 14, and add one on -- in the August 6th copy of the Sunday News, and as Plaintiff Exhibit 15 --

THE CLERK: 14 coming up.

THE COURT: Is that in 19 --

MR. LERNER: 1972. August 6, 1972. And as 14A an ad appearing in the Sunday News of July 23, 1972.

This is 14. This is 14A.

(Articles so marked as Plaintiff's Exhibits 14 and 14A.)

MR. LERNER: Would the Court take judicial notice of the fact, your Honor, that the Daily News is a paper circulated amongst several states of the union? It is delivered outside of the State of New York.

THE COURT: Is there any information pertaining to circulation in the News? You know, published from

time to time? That you are aware of?

MR. GARMANSKY: Circulation figure. Excuse me.

MR. LERNER: Your Honor, I'll just withdraw my request.

THE COURT: All right.

(Continued next page.)

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REDIRECT EXAMINATION

BY MR. LERNER: (Cont.)

Q Mr. Lieberman, did Galaxy Foods -- strike that.

Did the executive board of Galaxy Foods review these ads before they were placed in the Daily News?

A Yes, they did.

Q Did they approve the ads before they were placed in the Daily News?

A Yes, they did.

Q Thank you.

Next, Mr. Lieberman, I'd like to show you what appears to be a Xerox copy of an advertisement concerning Galaxy Foods appearing in the Buffalo Evening News, date of August 1st, 1972.

Please mark that Plaintiff's Exhibit 15.

THE CLERK: 15. A document marked for identification as Plaintiff's Exhibit No. 15.

(So marked.)

BY MR. LERNER:

Q Can you identify this ad, Mr. Lieberman?

A Yes. This was an advertisement placed in the Buffalo Evening News, by our people up in Buffalo, particularly Dave Weiss who was the area cocrdinator for Buffalo for Galaxy Foods.

Q Mr. Lieberman, do you know for a fact whether this paper circulates outside of the State of New York?

A Yes, I do.

Q And where does it circulate?

A It goes into Niagara Falls, New York, and also into Niagara Falls, Canada.

Q Thank you.

Mr. Lieberman, next I show you a copy -- strike that. Next I'd like to have marked as Plaintiff's Exhibit 16 a copy of an advertisement appearing in the newspaper, El Diario, dated August 20, 1972, and the advertisement is in Spanish.

THE CLERK: So marked Plaintiff's Exhibit No. 16 for identification.

(So marked.)

BY MR. LERNER:

Q Do you understand Spanish, by the way, Mr. Lieberman? Can you speak Spanish?

A No, I do not.

Q Do you recognize the ad?

A Yes, I do.

Q COuld you explain the circumstances around that ad?

A A group of the Spanish distributors had come to us and told us they wanted to place a Spanish ad in El Diario and

as I understand it they were going to literally translate the previous ad that you had showed me, the one that appeared in the Daily News and place it in a Spanish newspaper, in Spanish.

Q Thank you.

Mr. Lieberman, do you know whether or not this ad limits the offer of the Galaxy distributorships and field managerships to residents of New York State?

A I would have to look at it.

MR. GOIDEL: I'm going to object. I think the witness, your Honor, has already stated that he does not speak Spanish.

MR. LERNER: If he can recollect, your Honor.

MR. GOIDEL: Or understand Spanish.

THE COURT: Well, let him look at it and see if he has a recollection.

THE WITNESS: I would recognize "Nueve", whatever it is.

I do not see it appear here.

MR. LERNER: Your Honor, Mr. Lieberman has testified he does not read or understand Spanish.

However, Miss Williams from our staff does. She has read the ad and I would be prepared to put her on the stand to testify that no such reference is made in

the ad, unless counsel would be willing to stipulate.

MR. GOIDEL: Are you offering that?

MR. LERNER: I will be offering it.

MR. PADILLA: Can I look at it?

MR. GOIDEL: I'll conduct a voir dire before or after you offer it.

MR. LERNER: Certainly.

THE COURT: Maybe the defendant Padilla will make a concession.

MR. LERNER: I wold -- but I'd like a stipulation to that extent, your Honor.

BY MR. LERNER:

Q Mr. Lieberman --

MR. GOIDEL: Your Honor, if we are going to have a tender of these documents in evidence, may we have them one at a time now as we go through them?

MR. LERNER: Either way. your Honor.

MR. GOIDEL: Because I would want to conduct voir dire on each one.

THE COURT: Wouldn't it be better to take these as a group and do it all at one time?

MR. LERNER: I think it would save time.

MR. GOIDEL: I don't think so, your Honor, if I may be heard on that, for this purpose: I take

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it that they are going to be offered to indicate advertisements placed in newspapers by Galaxy Foods, Inc..

One or more may have been submitted or placed in a newspaper by Galaxy Foods, yet the testimony elicited so far would indicate to me, at any rate, that neither of the two that have been offered were in fact placed in the newspaper by Galaxy Foods, Inc..

So not knowing who submitted these advertisements to the newspapers, I would have to take each one separately.

THE COURT: Well, all I am saying is, I'd rather get the offer in one piece and your objection in one piece.

MR. GOIDEL: Okay.

THE COURT: From the standpoint of an orderly presentation.

BY MR. LERNER:

Q Now, Mr. Lieberman -- before I show you this, I'd like to mark this news paper, copy of a newspaper article appearing in the Canarsie Courier. It is undated.

THE CLERK: This will be marked Plaintiff's Exhibit No. 17 for identification.

(So marked.)

BY MR. LERNER:

Q Mr. Lieberman, I believe your prior testimony was that Galaxy Foods was never in operation outside of New York City?

A That is correct.

Q I'd like to now show you what has been marked Plaintiff's Exhibit 17 and refer you -- first let me ask you some questions about it.

Have you ever seen the article before?

A Yes, I have.

Q Who prepared it?

A A reporter from the Canarsie Courier.

Q Did he interview people at the company?

A I don't believe so.

Q Do you know how he got the information?

A He did come down to our warehouse and take a tour of the warehouse. He did leave with certain materials of Galaxy Foods.

Q Did he speak to anybody at the warehouse?

A I believe the only person that he really talked to -- I am sure the only person that he talked -- the one person that I know he talked to was Chris Marinaccio, who was executive vice president of Art Advertising.

Q I'd like to refer you to a particular statement

and ask you if it is an accurate statement.

MR. GOIDEL: Objection, your Honor. I'd object to anything which a reporter presented in a newspaper unless it is established that a defendant in this proceeding gave him information and requested that he put it into that article.

MR. LERNER: Your Honor, once again allegations go beyond the direct participation by a particular defendant in a particular act.

MR. GOIDEL: We have a hearsay statement at best, before us.

MR. LERNER: I'm asking him as to the accuracy of the statement, Mr. Goidel.

I'm not admitting this for its truth. I haven't even moved its admission.

MR. GOIDEL: On that limited basis, I'll withdraw my objection, your Honor.

THE COURT: All right.

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1 Lieberman - redirect

REDIRECT EXAMINATION

BY MR. LERNER (Cont'd):

Q First statement here and I'll read it so the record can pick it out: "Speaking of things financial, Galaxy is a growth company with present operations in the city, Long Island, Poughkeepsie, Buffalo and Montreal."

Is that an accurate statement?

A No, it was not.

MR. GOIDEL: Objection. You said you are not submitting it for the truth and falsity.

MR. LERNER: I asked him if it is an accurate statement. It is not coming in for its truth then, Mr. Goidel.

MR. GOIDEL: For its faslity?

Q By the way, Mr. Lieberman, was this article, Plaintiff's Exhibit 17, handed out to prospective investors?

A Yes, it was.

Q And at the time it was handed out, were you aware that the statement in there was inaccurate?

A Yes, we were.

Q It was handed out at Opportunity Meetings?

A That's correct.

Q And Sunday Step-Up Meetings?

A Not Step-Up. By Opportunity Meetings.

Q Let me ask you this, Mr. Lieberman:

Do you recall when this article came out, when it appeared, approximately?

A Just prior to the service starting. I would say the -- around September.

Q Of what year?

A Or October of 1972.

MR. LERNER: Thank you.

I'd like to mark this document which appears to be a one, two, three, four, five, six-page brochure. On the second page the title is "What is Galaxy Foods, Inc." as Plaintiff's Exhibit 18 for Identification.

THE CLERK: So marked for identification.

xxx (So marked.)

BY MR. LERNER:

Q Mr. Lieberman, have you ever seen this document before?

A Yes, I did.

Q Can you tell the Court who prepared it?

A I do not know.

Q Is it a company -- is it a document emenating from the company?

A No, it is not.

Q It is not -- did not emanate from the company?

A No, it did not.

Q Do you know where it emanated from?

A Yes, an independent distributor produced it.

Q Do you know what use was made of this document?

A I could only guess at it.

Q Don't guess at it. If you know, please state you know.

A I do not know.

Q Have you read -- did you have an opportunity during your employment or association with Galaxy to read through the document?

A I did not.

Q How are you able to recognize it?

A I have -- I've seen many documents like that.

Q Have you -- the question was --

A Yes. I've seen many like that and that one in particular on occasion -- one or two occasions in the past.

Q Where did you see the document?

A Distributor gave it to me.

Q Do you recall his name?

A No, I do not.

Q You had nothing to do with the preparation of

this document; that was your testimony; is that right?

A That's correct, I had nothing to do with the preparation of that document. There is one page or two pages in there that may be copies from one of the exhibits, the brown book. I am not sure of the exhibit number.

Q Do you know which pages they would be?

A The second page of this document marked for identification as Plaintiff's Exhibit 18. The fourth page of that same document and the last page.

Q Was taken from?

A It appears to be taken from the brown bag. I am not sure what the exhibit number is.

Q By the way, Mr. Lieberman, we've already marked this as Plaintiff's Exhibit into evidence No. 3. Isn't there -- wasn't there a rule which required approval by the company of all advertisements?

A Yes.

Q That's Rule 7, is it?

A Five, I believe.

Q Rule 5. Was approval given to Plaintiff's Exhibit 18?

A I would imagine, yes.

MR. GOIDEL: Objection. Either he knows or doesn't.

Q Do you know?

A I do not know.

Q Please answer to your knowledge.

A I'm sorry.

Q You stated that the last page was taken from Galaxy material; is that accurate?

A I said it appears to be from Galaxy material. If I could compare it, I could state for the record definitely.

Q Sure.

A Now we are talking about Plaintiff's Exhibit 11.

Q Right.

A I would have to compare it exactly word for word but there is a page titled "The Future with Galaxy Foods, Inc." and it also says "The Future with Galance Goods, Inc." on this.

Q Thank you. There is a statement on the last page of this document. Please tell the Court whether it is an accurate statement or not an accurate statement; all right?

MR. GOIDEL: Objection, your Honor. He's reading from a document not in evidence.

MR. LERNER: So what? I am not -- once again, your Honor, I am not admitting it for its truth or veracity at this time.

MR. GOIDEL: Your Honor, to get a statement

from a document that is not in evidence into the record by the guise of asking a witness whether or not that statement -- you may ask him if the statement is accurate without purporting to read it from that document.

THE COURT: Yes. You really can't read anything that isn't admitted into evidence. If you want to show the paper to the witness and have him read it to himself, that's one thing.

MR. LERNER: If that be the case, your Honor. I'd like to move Exhibit 18 into evidence at this time.

MR. GOIDEL: May I conduct a voir dire, your Honor?

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. GOIDEL:

Q Sir, looking at Exhibit 18, you say you have seen it previously; is that correct?

A That's correct.

Q You did not prepare it?

A Did not.

Q Did any member of the board of directors of your corporation prepare it?

A They did not.

Q Did any member of the board of directors of your corporation, to your knowledge, approve it?

A I do not know.

Q Now, sir, other than having seen this affidavit that was handed to you, do you know who received it?

A No, I don't.

Q To whom it was shown? To whom it was handed out?

A I don't know for a fact, no.

Q Do you know if any of the named defendants in this proceeding prepared this document?

A I don't know.

Q Do you know if any of the named defendants in this proceeding authorized its distribution to anyone?

A I don't know.

MR. GOIDEL: Your Honor, I certainly must object to the introduction of this in evidence.

THE COURT: I'll have to sustain that objection.

MR. LERNER: It sounds like it, your Honor.

The only basis on which I would have asked it moved into evidence is the fact that there is a rule in Galaxy that calls for the approval of all documents. However, I understand Mr. Goidel's objection and I will withdraw the document.

THE COURT: All right.

MR. LERNER: I'd like to mark as Plaintiff's Exhibit No. 19 a news -- copy of what is called The New York Association of Galaxy Distributors Newsletter.

THE CLERK: Two-page document marked for identification as Plaintiff's Exhibit No. 19.

(So marked.)

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BY MR. LERNER:

Q Mr. Lieberman, have you ever seen this document before?

A I cannot remember.

Q Mr. Lieberman, you recall on Thursday I asked you whether you knew a man by the name of Paul DeSiglia; is that correct?

A That's correct.

Q In connection with Mr. DeSiglia's name, I asked you whether or not you knew Mr. DeSiglia was a New York State resident or not?

A Yes.

Q I believe your answer to that was that to the best of your recollection he was a New York State resident?

A That's correct.

Q Now, Mr. Lieberman, I ask you whether you have ever heard of a man by the name of Werner Kunst?

A Yes, I have.

Q Mr. Lieberman, where does Mr. Kunst reside?

A In Hamburg, Germany.

Q Mr. Lieberman, is Mr. Kunst a distributor or a field manager of Galaxy Foods?

A I am positive he was a distributor.

Q When he was a distributor, when he joined as a

distributor, was he a resident of West Germany?

A No, he was a resident of New York.

Q You are certain about that?

MR. GOIDEL: Objection. Argumentative.

MR. LERNER: I will withdraw my comment. Let me mark as Plaintiff's Exhibit number 19 an application, Galaxy Food application --

THE COURT: I think it is 20.

THE CLERK: That's correct, your Honor.

MR. LERNER: For Mr. Werner Kunst.

THE CLERK: Four-page document marked for identification as Plaintiff's Exhibit number 20.

(So marked.)

BY MR. LERNER:

Q Mr. Lieberman, have you ever seen this document before?

A Yes, I have.

Q Was that document kept in the ordinary course of business of Galaxy Foods?

A Yes, it is.

Q I refer you to the first page of the document, where the name Mr. Kunst appears. Does it have his residence address?

A Yes, it does.

Q Would you please read it into the record?

MR. GOIDEL: Objection. Your Honor, at best that is hearsay, that is number one. Number two, that doesn't mean that Mr. Kunst is correct as to the legal implications of what his residence is, nor does it mean that Mr. Kunst does not have multiple residences, but at best it is hearsay because that is Mr. Kunst's statement.

MR. LERNER: It is not hearsay, your Honor. It is a document --

MR. GOIDEL: Of course it is.

MR. LERNER: Mr. Goidel, may I answer your objection, please?

MR. GOIDEL: After I finished it.

MR. LERNER: Then go on.

MR. GOIDEL: I am finished.

MR. LERNER: It's a document that reflects information kept in the ordinary course of the business of Galaxy. Any information appearing on that document would be an exception to the hearsay rule.

THE COURT: It would seem so to me.

MR. GOIDEL: Offer it in evidence, but don't ask him to read it into the record.

MR. LERNER: I would like to offer this document,

number 21 into evidence.

MR. GOIDEL: Are you offering the entire document?

MR. LERNER: The entire document, four pages.

MR. GOIDEL: May I have a voir dire, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. GOIDEL:

Q Sir, do you know who typed that document, the typewritten portion?

A I do.

Q Who typed it, sir?

A It was typed by Franz Quack.

Q Mr. Quack is not a party to this proceeding, is that correct?

A That's correct.

Q Now, sir, do you know Werner Kunst?

A Yes, I do.

Q Do you know where he executed his application?

A In New York, in our offices.

Q Do you know where Mr. Kunst lived when he was in New York?

A Yes, I do.

Q Where?

A He lived in Mr. Quack's residence.

Q That would be 565 Mint Street, Brooklyn, New York?

A That's correct.

Q As a matter of fact, that is the address listed here on this document?

A That's correct.

MR. LERNER: Would you please refer to what address you are talking about?

BY MR. GOIDEL:

Q The address over in the right-hand corner of the first page?

A That's correct.

Q Is that correct?

A Yes.

MR. LERNER: Where it says, "care of"?

MR. GOIDEL: That's right, "care of."

Q Now, sir, do you know of your own knowledge now whether Mr. Kunst also maintained a residence in Hamburg, Germany?

A Yes, I do.

Q Did he tell you this?

A Yes, he did.

MR. GOIDEL: I have no objection to this document being offered for the limited purpose that it has been

offered for, your Honor, that is, that it is a record kept in the normal course of business.

MR. LERNER: That's right.

THE CLERK: Plaintiff's Exhibit 20 now marked in evidence.

(So marked.)

REDIRECT EXAMINATION

BY MR. LERNER (continued):

Q Now, with respect to Plaintiff's 20, would you please read the address given for Mr. Kunst?

A Yes.

MR. GOIDEL: I am going to object. Don't point anything out to him because there are multiple residences listed.

Q Give the address Mr. Kunst stated on the form.

MR. GOIDEL: He is not a lawyer yet. You are asking him for the residence address.

MR. LERNER: Excuse me, I will rephrase the question.

Q Let me refer you to the center box on this document, Mr. Lieberman. You see Mr. Kunst's name?

A Yes, I do.

Q And directly underneath his name do you see the word "address"?

A Yes, I do.

Q Would you please read that statement into the record?

A Wurmkamp 1, Hamburg, Schenefeld, Germany.

Q Thank you. Let me refer you to the second page of the document --

MR. GOIDEL: Your Honor, if I may be heard again. I don't want to belabor the record, but this document was offered for the purpose that it was a document kept in the normal course of business.

Reading a man's address as it may be typed, if it were prepared by someone other than a party to this litigation, would constitute hearsay, and at that point the document, I presume, would be submitted for the purpose of proving the truth or falsity of a statement which would constitute hearsay.

That document is in evidence, as I understand it for a limited purpose, and to extend that purpose to the truth or falsity of an allegation or a statement made on that would be improper. I ask your Honor to so rule.

MR. LERNER: I intend to ask the witness questions about the document.

THE COURT: May I see it?

MR. LERNER: Certainly (handing to Court.)

THE COURT: What are you going to do about the next page, Mr. Goidel?

MR. GOIDEL: What is that, your Honor?

THE COURT: I couldn't help looking at what was attached to it.

MR. GOIDEL: Naturally.

THE COURT: Have you seen it?

MR. GOIDEL: Yes, I have seen it, your Honor. Again, it is a document which is apparently prepared by persons other than parties to this litigation.

THE COURT: Except that if we are talking about records that the company maintained in the regular course of its business, are you questioning the authenticity, let us say, of that agreement that is annexed?

MR. GOIDEL: Yes.

THE COURT: I realize the witness hasn't --

MR. LERNER: Your Honor, we can go on to question the documents that Mr. Goidel offered into evidence, concerning the books and records of the corporation --

THE COURT: Books and records of a corporation are more clearly records made and kept in the regular

course of business.

I would, I think, view the application form as certainly such a record made and kept in the regular course of business.

The next document I think might qualify also as a copy of an agreement.

MR. GOIDEL: Excepting this, the document itself, your Honor, does not speak the truth as we already know the truth, and that is it purports to be the Board of Directors. It is signed supposedly by Kenneth T. Rosenthal. Mr. Rosenthal was not a member of the Board of Directors --

MR. LERNER: That's not true, your Honor, he was the Chairman of the Board.

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REDIRECT EXAMINATION

BY MR. LERNER: (Cont.)

THE COURT: Yes, he was. I thought he was until he was succeeded by --

MR. LERNER: Ask the witness.

MR. GOIDEL: Of the exeuctive board of the Board of Directors?

THE WITNESS: Yes.

MR. GOIDEL: I'm sorry, I'm confused.

THE COURT: That's the problem. Again, it still doesn't mean that the statements are accurate, and since Mr. Rosenthal is not a party to this proceeding -- in other words, the limited purpose for which that if offered, a document kept in the normal course of business is fine.

It has a prima facie validity about it that could be rebutted, assuming that Mr. Quack, for example, is the author of all of this and is available, and if you feel that you want him here --

MR. GOIDEL: I will take it up on cross-examination then, your Honor.

MR. LERNER: Thank you.

BY MR. LERNER:

Q Mr. Lieberman, referring you and directing

your attention to the second page of the document, third paragraph, states: "Mr. Kunst is a resident of Hamburg, Germany," is that correct?

A Yes.

Q Mr. Lieberman, did you witness the signing of this document by Mr. Kunst?

A YEs, I did.

Q Thank you.

Mr. Lieberman, I note on the application form itself that there is no statement limiting the application to New York; is that correct? Limiting applicants to New York residents?

A Well, I'm not sure -- I guess that would be an accurate statement, although there is a statement here which, prior to a stamp being made -- yes, yes, there is.

It says, "State, New York, quota 1,079, total sold, 99, remaining --

Q The question was, is there a statement on there, specifically limiting investors in Galaxy to New York State residents?

A Not this form, there is not.

Q Did there later come a time when a form was printed by Galaxy which did specifically limit the applicants to New York State residents?

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A Yes.

Q When did that come about?

A In early 1972. Approximately -- I believe March of 1972.

Q Several months after Galaxy had begun its business; is that correct?

A Yes.

Q And is that form reflected in Plaintiff's Exhibit 8 in evidence?

A I don't believe it was on that form either.

Q Well, was there eventually a form which ever did specifically limit applicants to New York State residents?

A I don't believe it ever said applicants are limited to New York State residents on that form.

Q Thank you.

MR. LERNER: Next, I'd like to mark as Plaintiff's Exhibit 21 this pink sheet of paper.

THE CLERK: One page document marked for identification as Plaintiff's Exhibit 21.

(So marked.)

xxxx

BY MR. LERNER:

Q Have you ever seen this document before, Mr. Lieberman?

A Yes, I have.

Q Where does it come from?

A From that brown book that we have been -- I believe it's Plaintiff's Exhibit 11.

Q Who prepared it?

A It was prepared by the same people who prepared the rest of the book.

Q And that is already in evidence?

A That's correct.

Q When was it prepared?

A When the book was first prepared?

Q Would that have been sometime during 1972?

A That's correct.

MR. LERNER: I'd like to move this document into evidence.

MR. GOIDEL: I thought you said it's already in there.

THE COURT: There is no objection to having it marked separately as an exhibit, Mr. Goidel?

MR. GOIDEL: I assume it's the same document so I don't have to reread it.

THE COURT: It came out of the book.

MR. GARMANSKY: No. That pink document, Plaintiff's Exhibit --

MR. LERNER: He'll testify to it. We will

establish what the situation was, your Honor.

VOIR DIRE EXAMINATION

BY MR. GOIDEL:

Q There are two documents, sir, that read very much alike. You just made a statement that it was -- "it" meaning the new one just shown to you, marked as Plaintiff's Exhibit 21, that it appeared when Galaxy first printed that book?

A That's correct.

Q Sir, was this printed at that time or was the one next to it, which is part of Plaintiff's Exhibit 11, the one that was printed when that book was prepared?

A No. This page, Plaintiff's Exhibit 21, was the one that was originally prepared.

Q Was originally prepared?

A That's correct.

MR. GOIDEL: I have no objection the, your Honor.

MR. LERNER: Mark that in evidence, please.

THE CLERK: Exhibit 21, now marked in evidence as Plaintiff's Exhibit 21.

(So marked.)

xxxx

REDIRECT EXAMINATION

BY MR. LERNER: (Cont.)

Q Mr. LIeberman, direcint your attention to Plaintiff's Exhibit 21 now in evidence, for how long a period of time was this document used by Galaxy?

A One or two months, no more.

Q And it was used and was made part of, for that period of time, Plaintiff's Exhibit 11; is that correct?

A That's correct.

Q Is the document before you, Plaintiff's Exhibit 21, accurate in all respects?

A No, it is not.

Q Why not?

A Because it states, "Galaxy is already in New York City, Buffalo, Poughkeepsie, Montreal, Canada and nearyby New Jersey."

Q Thank you.

THat statement is inaccurate; is that correct?

A That's correct.

Q I'd like to once again direct your attention to the training session. At the training session, were distributors and franchisees who attended those sessions told by the instructors at those sessions that when they propect or cold-canvas somebody they had to first inquire whether they were New York State residents?

A They were not.

Q Let me direct your attention to Opportunity Meetings, Mr. Lieberman.

When potential investors came to Opportunity Meetings, was it in the script of the meeting or did the guest speaker himself indicate to those people at the meetings that they had to be New York State residents in order to join the company?

A I believe it was in the script.

Q It was in the script? Would you please locate it for me.

A Yes.

The very last line of the script says, "Investments are available only to residents of New York State."

THE COURT: What page is that?

MR. LERNER: 10.

Q By the way, Mr. Lieberman, was it in all the scripts?

A I don't believe so.

Q It wasn't?

A I don't believe it was.

Q So your statement is not accurate that it's in the script?

MR. GOIDEL: Objection, your Honor.

He asked him and then showed him --

MR. LERNER: I'll withdraw my statement if you feel it's argumentative.

MR. GOIDEL: Thank you.

BY MR. LERNER:

Q Let me refer you to Plaintiffs Exhibit 5, which also contains a script. Was it in that script?

A I don't find it, no.

Q What period of time was that in use?

A This was our first formal manual, so I would say it was in use until just around March of 1972.

Q So for that period of time, at the Opportunity Meetings, no mention was made by the speakers that the offers were restricted to New York State residents?

MR. GOIDEL: Objection, unless he can testify that he was present. I believe he stated that he was absent for most of them, your Honor.

Q Let's limit the question: At the Opportunity Meetings which you attended, do you recall at each and every meeting speakers stating to those in attendance that the offer of the investments in Galaxy were limited to New York State residents?

A I cannot recall that at each and every meeting that statement was made, no.

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9 Lieberman - redirect

Q Let me refer you now to PLaintiff's Exhibit No. 4, which also contains a script and has been marked into evidence.

Is there any statement in that script that the offer of the Galaxy franchises are limited to New York State residents?

A I don't find it, no.

Q And for what period of time was this script in use at Galaxy?

A If I can see it maybe I can place it a little closer to the time.

Q Certainly.

A This apparently came out 3/1/72, by the first page, and the blue manual would tell when that came out, that's the one that followed, Plaintiff's Exhibit 3.

Q When did the blue manual come out, do you know?

A Yes. October, 1972.

Q So between the months when Galaxy started and October, 1972, is it not a fact that these manuals which contain the scripts that were to be read at the Galaxy meetings, didn't contain a restriction on limiting the distributorships or field managerships to New York State residents?

A That's correct.

Q Thank you.

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Q Let's now go to the Sunday step-up meeting. Were potential investors at the Sunday step-up meetings informed that they had to be New York State residents to join the company?

A I don't believe they were informed by the speakers at the step-up meeting, if that's what you are asking.

Q By the way, at these training sessions, were potential -- were the investors told where they should be prospecting for new customers or new franchises?

A Yes.

Q Like, for example?

A Every place: subways, on the streets of Manhattan.

Q Would Penn Station be, for example, one place?

A In the -- I don't remember particularly Penn Station. Shopping Centers, the main ones that we --

Q Is it a fair statement then, Mr. Lieberman -- strike that.

During the course of the -- of running Galaxy's business, Mr. Lieberman, was there occasions when information was mailed by the company to distributors and field managers?

A Yes.

Q Who authorized the mailing?

A The executive board of Galaxy.

Q Approximately how many pieces of mail during Galaxy's existence were mailed out to distributors and field managers?

A Sometimes as much as two or three pieces or maybe even more a week.

Q In total, would you have an idea?

A I'd have to hazzard a guess, that there was, based on the information I have, that there was somewhere between 700 and 1,000 pieces of mail mailed out.

Q All right. We understand that you are only hazzarding a guess with respect to that.

Could you tell us what percentage of the pieces mailed out referred to the wholesale end of the business, the sale of franchises?

A About 50 per cent.

Q Where did the addresses to whom these -- where the addressed derived, in order to send out these pieces of mail?

A When we got the applications back we made a mailing list from these addresses.

MR. LERNER: Thank you.

Your Honor, at this time I have several

pieces of letters, if you will, which were mailed out and I don't wish to burden the Court with going through all of them.

There are a few selective pieces which I would like to examine with the witness, if the Court would permit me the indulgence.

THE COURT: All right.

MR. LERNER: Before I do that, I would like to move into evidence at this time the newspaper author calls.

THE COURT: All right.

MR. LERNER: I'd like to move into evidence Plaintiff's Exhibits 14, 14A, 15, 16 and 18.

MR. GOIDEL: Thank you.

VOIR DIRE EXAMINATION

BY MR. GOIDEL:

Q Sir, I show you Plaintiff's Exhibits 14 and 14A.

May we have the original one, please?

MR. LERNER: Exhibit 7?

MR. GOIDEL: Yes.

Q (Continuing) And I also show you Exhibit 7, which is already in evidence.

Now, I believe in relation to Exhibit 7 you've

already acknowledged that the ad was put in the newspaper before the executive board was shown it; is that correct?

MR. LERNER: Exhibit 7? Objection, your Honor. That's not his testimony.

Q Is that your testimony?

A That is not my testimony.

Q In other words, it was first discussed with the executive board and then put in the newspaper?

A That's correct.

Q What date?

A Just prior to the placing of the ad.

Q What date?

A I'd have to have the date that the ad was put in, and I don't have it.

Q What date did you have the meeting that authorized it?

A I don't recall the exact date.

Q Name for me all people present at that meeting.

A I cannot name everybody present at the meeting.

Q Which came first, Exhibit 7 appearing in the newspaper or Exhibit 14 or 14A?

A There is no date on Exhibit 17.

Q Can you tell us which came first?

A No, I cannot.

Q Was there a separate meeting of the executive board for approval of each of the ads?

A No.

Q Just one approval given; is that correct?

A That's correct.

Q But you don't know when?

A I don't know the exact date.

Q And you don't know who was present ?

A I can't testify to that -- who exactly was there, no.

Q And you don't know who exactly was there at the particular moment that the particular ad was discussed, even though everybody at one time or another during the course of that day was present at one of those meetings; is that correct?

A That's correct.

MR. GOIDEL: Your Honor, I object to the introduction of that as relates to my two clients, and only for that limited purpose.

Your Honor certainly has my approval, not that he needs it, for the acceptance of that for any other defendant in this proceeding.

MR. LERNER: Your Honor, he has testified that although he cannot remember everybody that was present, he does remember that Donald K ach was present.

MR. GOIDEL: No, he did not say that.

MR. LERNER: The record will --

MR. GOIDEL: Then I will refine my questioning even further.

(Cont'd on next page.)

Q Sir, at what time was the vote taken?

A There was no formal vote taken.

Q What time of the day was that discussed?

A Morning.

Q When in the morning?

A Before noon.

Q 8 O'clock in the morning, 9 O'clock, 10 O'clock, 11 O'clock, 12 O'clock, what?

A I can't be sure.

Q Do you specifically remember Mr. Kirsch, though, sitting there when it was discussed?

A I remember that Mr. Kirsch was at the meeting where this was discussed.

Q I am not asking you whether he was at the meeting when it was discussed. I am asking you if you recall exactly that Mr. Kirsch was in the room when the discussion regarding this was taking place?

A No, I do not.

MR. GOIDEL: Your Honor, I object.

My objection stands. At least as relates to Messrs. Kirsch and Shevack.

MR. LERNER: That's something to be argued in his final brief, your Honor, whether it relates to him or not.

MR. GOIDEL: No, your Honor. The document may be offered as evidence against certain defendants and not other defendants. I am asking that it be excluded as it relates to my two clients because there has not been any basis shown or any foundation that my clients had anything to do with the approval or printing of these documents.

THE COURT: Which one are you talking about?

MR. GOIDEL: 7, 14 and 14A.

THE COURT: Hasn't 7 been --

MR. GOIDEL: I already made my objection as relates to 7 and your Honor took it over my objection.

I am now renewing my objection as relates to 7.

THE COURT: Let me see 7 again.

May I see 7 again, please?

THE WITNESS: You want all of them?

THE COURT: Let me see.

MR. LERNER: Is it possible for you to read Mr. Goidel's last question and answer? And the answer given?

(Record read.)

THE COURT: I understand the point of your objection, Mr. Goidel, but I think I will

admit these into evidence.

As I understand the Commission's burden here, basically it is to establish that -- really a jurisdictional fact, one might also call, of the sale of a security.

MR. GOIDEL: Yes, your Honor.

THE COURT: It seems to me that the Court has to take evidence of this kind into account on that issue.

MR. GOIDEL: I agree.

THE COURT: Regardless of the fact that the case is proceeding against your two clients only.

MR. GOIDEL: Your Honor, I don't disagree with what your Honor has just said.

I am saying, and we will certainly follow that up on our closing statement, if they're offering this to demonstrate the Galaxy Foods used Interstate Commerce or the facilities of Interstate Commerce, fine.

Then we'll certainly have no objection to accepting that for what ever evidence it establishes towards that. But that's not the purpose.

The questions asked were whether or not Kirsch was present at a time or whether the executive

board was present. The implication was that Mr. Kirsch approved it.

THE COURT: You have his answer, you understand. You have the witness' answers, that he has --

MR. GOIDEL: The fact that Galaxy may have engaged in interstate commerce is fine.

Another question is, did my clients engage in interstate commerce. That's another issue. I don't want the confusion to be --

THE COURT: I realize that your clients also -- perhaps are not in the same position.

MR. GOIDEL: Right.

THE COURT: What I mean -- and vis-a-vis one another.

MR. GOIDEL: Yes sir.

THE COURT: Kirsch's own testimony is he was a member of the -- he had an official title, vice president marketing, and he was a frequent attendant at the executive board meetings.

MR. GOIDEL: True. But that doesn't mean that he knew of this, your Honor.

THE COURT: I understand.

MR. GOIDEL: They may have discussed a

million things.

THE COURT: I understand that, but there are various issues as to which this may be very relevant. Certainly I have to overrule your attempt to bar this material from the record because, as I pointed out, one of the issues the Securities -- the Commission has to deal with is the question of proving that a security was offered for sale and the means by which it offered, perhaps insofar as they bear on other aspects of communication, that is.

So I have to say, also on its face, that ad invites the use of the telephone.

There is a claim in here of violation of anti-fraud provisions of the Act, all of which goes to the basic proof they must offer to the Court to establish their basis premises.

Questions such as you are concerned with; namely of relief against your client is something else again.

I mean, I have to consider whether your client was close enough to the power house to be in effect one who was transmitting some of this high level voltage emanating to the public at large or whether Schvack was close enough to the powerhouse to be part of that.

So that some kind of protective insulation is required against future transgressions. I don't know. That's another issue in the case.

MR. GOIDEL: May I ask one of the questions then, your Honor, of this witness? And again may I only point out that I did not try to object to the introduction of this into evidence as it relates to any other defendant other than my own two clients.

THE COURT: I am sure you are being very selective in that regard.

MR. GOIDEL: I certainly am.

I have one other question though, I must ask with regard to this.

VOIR DIRE EXAMINATION

BY MR. GOIDEL (cont'd):

Q Do you know whether these ads in terms of time appeared prior to or subsequent to this sale of any franchise by Mr. Kirsch?

A Subsequent to. At least subsequent to Howard Beck coming into the business. I don't know about the other persons.

Q But you don't know whether Mr. Kirsch made any sale after this ad was in?

A No, I do not know.

THE COURT: Do you understand the question?

THE WITNESS: Yes, your Honor.

I do not know that for a fact.

Q Now let's turn to Plaintiff's Exhibit 15. I assume you now want to have these marked in evidence, your Honor, or have the -- they marked for identification.

THE COURT: I assume you have completed your attack on 14 and 14A?

MR. GOIDEL: I have completed my attack, your Honor.

THE COURT: All right, so they are now in evidence.

THE CLERK: All right. So marked in evidence, 14 and 14A, Plaintiff's Exhibits.

(So marked.)

THE COURT: All right.

Q Sir, let's take Exhibit 15. This apparently appeared in the Buffalo Evening News?

A That's correct.

Q Is that correct?

A Yes.

Q You mentioned a Mr. West as being the --

A Wes, without the t.

Q Wess?

A Wess, W-e-s-s.

Q Mr. Wess, area coordinator I think was the designation you gave to him?

A That's correct.

Q Was he an independent distributor?

A Yes.

Q Did he or did the corporation pay for that ad?

A I don't recall.

Q You cannot say for certain that the corporation paid for it; is that correct?

A That's correct.

Q Do you know whether the corporation authorized the publication of this?

A Yes, I do know that we did.

Q Do you know whether any other named defendant did?

A Not for a fact.

MR. LERNER: Your Honor, the question is a little bit confusing.

THE COURT: A corporation acts only through individuals.

MR. GOIDEL; Obviously.

Q I mean, Mr. Shevack, Mr. Kirsch, Mr. Padilla?

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MR. LERNER: Let him ask him where --

Q Do you know whether they authorized its publication?

THE COURT: Well, it is cross-examination. He has a right to --

MR. LERNER: he is confusing the witness, though. I am confused.

THE COURT: I understand the problem.

MR. GOIDEL: I'll withdraw it and I'll -- this is actually a voir dire and I shouldn't be doing this and so I'll withdraw it, your Honor.

Q You say the corporation did authorize this?

A That's correct.

MR. GOIDEL: I have no objection to its introduction. I'll save the rest for cross-examination.

THE COURT: That is in evidence. All right.

THE CLERK: May I have it, please, 15 so I can mark it? Mr. Goidel?

THE COURT: Is that one different? Go ahead, mark it.

THE CLERK: Yes, your Honor. So marked Plaintiff's Exhibit 15 in evidence.

(So marked.)

Q Again going through our voir dire, sir, this is now Plaintiff's Exhibit 16. That's the Spanish language article. The corporation paid for this, sir?

A No, we did not.

Q The corporation authorize its publication?

A Yes, we did.

Q Where and when?

A Approximately a week before its publication.

Q When was it published?

A I cannot say for a fact when.

Q But you know a week before that there was a meeting of something, of someone, of what?

A A group of the Spanish distributors came into our office and spoke to the people in our field operations and I was present.

Q Who else was present?

A I believe Steven Roth and Bruce Katz.

Q Anyone else?

A Not that I can recall.

Q But the corporation, that is, the three of you authorized the publication of this?

A That's correct.

MR. LERNER: Objection. Whom are you referring to when you say "the three"?

Q Steve Katz, Mr. Roth and yourself?

A Steve Roth, Bruce Katz and myself.

Q Is that correct? The three of you authorized it?

A That's correct.

MR. GOIDEL: No objection.

THE COURT: Is that particular one in Spanish?

MR. GOIDEL: That's the Spanish publication, yes your Honor.

THE COURT: Is it basically a translation of what we have in English?

Did I hear you say that?

MR. LERNER: Your Honor, that is the article which does not refer to the limitation to New York State residents.

THE COURT: No, but is it correct to consider it as a virtual translation of the other ads that appeared in the Daily News and some of the local papers?

THE WITNESS: That's what we had understood it to be, your Honor.

THE COURT: But you do not know that for sure?

THE WITNESS: I do not.

Q Sir, Plaintiff's Exhibit 17 is a document that appeared in the Carnesie Currier? That is not an adverisement, is it?

A No, it is not.

THE CLERK: Plaintiff's Exhibit 16 marked in evidence.

(So marked.)

Q That was an article written by a reporter, is that correct?

A That's correct.

Q Did anyone authorize the publication of this document?

A No.

Q Did anybody ask the reporter to say what was said there?

A No.

Q Did anyone pay, that is, by anyone, I mean any of the defendants, pay to have this article written about Galaxy Foods, Inc.?

A No.

MR. GOIDEL: Your Honor, this would constitute hearsay, without authorization by the corporation or any of the parties defendant and I must object to its

introduction.

MR. LERNER: Your Honor, the witness has testified that the article was kept by the corporation and was used by the corporation at opportunity meetings. At least at opportunity meetings, through its distribution to potential investors?

THE COURT: May I see it?

MR. LERNER: Certainly.

THE COURT: It says in this article or it gives something about yourself inside. Were you interviewed by this reporter?

THE WITNESS: No, I was not.

THE COURT: Where did he get the information concerning you?

THE WITNESS: Very possibly from the -- from one of the company produced materials.

THE COURT: Is it true of some of these others who were mentioned here, Avni and Horowitz and Katz?

THE WITNESS: The only material might -- I can only speculate, but I believe it might have come from Chris Marinaccio because I know that he spent some time with this individual.

THE COURT: Well, now, what is your authority in offering this, Mr. Lerner?

MR. LERNER: My authority is that Mr. Lieberman and others -- other members of Galaxy, authorized the use of that document at Opportunity Meetings, the use meaning its distribution to potential investors, and I believe in the course of the certain inaccurate statements in there, it would go to our allegation that fraud was committed by the company.

THE COURT: This particular exhibit, is this what you would call a reprint?

THE WITNESS: Yes, your Honor.

THE COURT: Do you remember how that came into existence?

THE WITNESS: Well, that particular one Galaxy Foods didn't reprint.

The only ones that we reprinted were in red, and we did have it photostated, our art department had it photostated for use at Opportunity presentations prior to people hearing the program so they would get an idea of the basic concept of the service.

THE COURT: When you say "red," you mean the paper was red?

THE WITNESS: The ink was red, your Honor.

THE COURT: But it was identical?

THE WITNESS: It was exactly the same thing.

THE COURT: You say they authorized it, that's your contention?

MR. LERNER: I believe he's testified to that.

THE COURT: For distribution at Opportunity Meetings?

THE WITNESS: Oh, yes, your Honor.

THE COURT: But he has testified, I believe, that the reference to Montreal is inaccurate.

THE WITNESS: That's correct.

THE COURT: Was anything done to strike that out in any reprints, to your knowledge?

THE WITNESS: No, your Honor.

THE COURT: I will accept it for what it is worth.

THE CLERK: Plaintiff's Exhibit 17 now in evidence.

(So marked.)

MR. LERNER: Can I accept a stipulation from the parties that the Exhibit 16 makes no reference to a limitation to New York State residents?

MR. GOIDEL: We will stipulate that if someone familiar with the Spanish language were to take the

witness stand, they would testify that the word "New York" or "limitation" with regard to New York does not appear in that article.

MR. LERNER: Mr. Padilla, do you agree with that stipulation?

MR. PADILLA: Yes.

REDIRECT EXAMINATION

BY MR. LERNER (Cont'd):

Q Referring you to Exhibit 17, briefly, Mr. Lieberman was this document discussed at an executive board meeting prior to its distribution at Opportunity Meetings?

MR. GOIDEL: Which document, please?

Q Exhibit 17, the Canarsie Shopping Business.

A Yes, it was.

Q To the best of your recollection, do you know whether Mr. Kirsch was present at that meeting?

A Yes, I do know that Mr. Kirsch was not present.

Q How do you know that?

A He was already out of the company when we decided to reproduce these to use at Opportunity Meetings.

Q Those were produced after January '73?

A That's correct.

Q I'd like to ask you the same question concerning the one on -- the Spanish one, was that one discussed at an

executive board meeting?

A No, it was not.

Q And Exhibit 15, the one from the Buffalo Daily News?

A I don't believe this was either.

Q You previously testified -- do you recall your previous testimony in connection with Plaintiff's Exhibit 7, that the executive board had discussions concerning that exhibit?

A That's correct.

Q Do you recall your previous testimony that Mr. Kirsch was present at those discussions?

A I do.

MR. GOIDEL: Objection. That's not what his testimony is. If he wishes to ask him a question --

MR. LERNER: May I read his testimony, Mr. Goidel?

MR. GOIDEL: Fine.

MR. LERNER: Page 391.

"Question: Was Plaintiff's Exhibit 7 in the form that you are looking at it now given to the executive board for their approval?

"Answer: No.

"Question: Did the executive board have any discussions concerning Plaintiff's Exhibit 7?

"Answer: Yes.

"Question: Was Mr. Kirsch present at those discussions?

"Answer: Yes.

"Question: Please tell us what was discussed concerning Plaintiff's Exhibit 7.

"Answer: The first question you asked me was it presented in the form it was in now, it was presented handwritten or typed out, I'm not sure, but prior to it going into the newspaper."

BY MR. LERNER:

Q Do you recall those questions being asked of you and the answers given?

A Yes.

Q Are they accurate?

A They are.

Q What was the function of the executive board?

A It was set up to establish policy for the corporation of Galaxy Foods.

Q Did it also implement the policy?

A Yes.

Q And is that in fact what the executive board did?

MR. GOIDEL: Objection. That calls for a

conclusion.

MR. LERNER: He would know, your Honor. He was on the executive board. He testified to his own knowledge.

BY MR. LERNER:

Q Did they set up policy and implement it?

THE COURT: I'll overrule your objection.

THE WITNESS: Yes, they did.

Q Was there ever a policy discussed and approved by the Executive board that executive board members circulate amongst potential investors at Opportunity Meetings to assist in the closing of sales?

A Yes.

Q Did you at any time observe Mr. Kirsch circulating at Opportunity Meetings amongst potential investors?

A Yes.

Q Did you ever observe him assist in the closing of sales?

A Yes.

Q During what period of time?

A I would say almost every time he was at a meeting prior to October, 1972, when he didn't have his own guest.

Q You mean at a time when he didn't have his own

guests, prior to October '72?

A That's right.

Q One other thing crossed my mind, to go off on a tangent for a second.

The Sunday Step-Up meetings, was it also a policy adopted by the executive board and approved by the executive board that officers of the executive board be present at Sunday Step-Up meetings?

A I think I've so testified.

Q Was it a practice, and did you in fact do it, to bring potential investors into the office of the different personnel of the company?

A That's right. They were told to go to their offices after the presentation so that various people who might be considering buying franchises could speak to them.

Q Do you specifically recall instances where you brought potential investors into the office of Mr. Kirsch?

A Yes.

Q What was the purpose for which you brought them in?

A So that Mr. Kirsch could explain any details about the program that the individual might be in doubt about and convince him to purchase a franchise.

MR. LERNER: Your Honor, this shouldn't take

too long. I'd like to show Mr. -- possibly we can do this in a lump.

I have picked out several letters, correspondence that goes to the question of jurisdiction once again, which were mailed out by the company to franchise holders.

MR. GOIDEL: Your Honor, may I make the suggestion that since I'm going to have to look over all of these documents, that I be given an opportunity during our recess to look it over and then Mr. Lerner can once again approach the witness with them, and we may save some time that way.

THE COURT: All right.

MR. LERNER: Then I'd only like to discuss one or two of these and I'll be done with my examination.

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(Continued on next page.)

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BY MR. LERNER:

Q Just a couple of points I'd like to bring out, Mr. Lieberman. It was a stated policy that eight to ten thousand, I believe, customers, retail customers, would eventually be distributed among the franchise holders. Is that an accurate statement?

A That's correct.

Q Did that ever occur?

A No, it did not.

Q Sometime, I believe toward the end of 1972, were the franchise holders informed that they would have to wait until eight thousands customers were acquired by the company before they could earn commissions on sale of food?

A Would you read that back to me, I'm not sure.

Q I will rephrase it.

Was it not stated to the franchise holders that unless eight thousand customers were accumulated by the company, no commissions could be earned on the sale of food to those customers?

A To that I would answer yes.

Q By the way, how were these eight to ten thousand customers that were going to be distributed amongst the franchise holders to be accumulated?

MR. GOIDEL: I am going to object. This was taken

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up on direct examination three days ago. Now we are going into it again.

I don't know that anybody has ever questioned it, and I think this is improper redirect.

MR. LERNER: If the Court will give me an opportunity, I think that the meaning of the question will become clear.

THE COURT: Go ahead.

MR. LERNER: I will try and be as brief as possible.

Q Could you answer the question?

A I'm sorry?

Q How were the ten thousand going to be accumulated?

THE COURT: Ten thousand?

Q Eight to ten thousand were originally going to be distributed out amongst --

A By voluntary distributors.

Q By voluntary --

A Distributors acquiring themselves.

Q And they were going to pool it with the company?

A That's correct.

Q Was there ever a projection made by the company as to when individuals would begin earning commissions on their franchises -- rather, commissions on the sale of food to cus-

tomers?

A No.

Q Was there ever a discussion at the Executive Board meeting when the company anticipated your reaching the eight thousand figure mark?

A Yes.

Q When was that?

A We figured about five months after the pilot program started.

Q The pilot program began in November, is that correct?

A That's correct.

Q And five months later would be what, March?

A Well, December, January, February, February, March, April.

Q Around April?

A That's correct.

Q By the end of 1972, when Mr. Kirsch was still with the company, how many customers had the company acquired? And try to be accurate in your answer, as accurate as possible.

A I believe 2500 would be a fair statement.

Q Wouldn't it be more like a thousand?

MR. GOIDEL: Objection, that's argumentative.

MR. LERNER: I will try and refresh the witness'

recollection, your Honor.

THE COURT: It doesn't appear to need refreshing. He said a number.

Q Are you certain it was 2500?

A No, I'm not certain.

Q To begin with, let me show you a document, a memorandum -- I will mark it as an Exhibit -- which is dated December 18, 1972, to: All Field Managers and Distributors. From: Steven Roth, Vice President of the Executive Board.

THE COURT: Wait a minute, I am confused. I thought you were directing his attention to January of 1972.

MR. LERNER: The end of the year, '72. The question was, How many questions had been acquired.

THE COURT: You meant January, '73, then?

MR. LERNER: January '73-December '72, that's the area I am involved in right now.

THE CLERK: Plaintiff's Exhibit number 22 for identification, so marked.

**** (So marked.)

Q Mr. Lieberman, were memorandums sent to distributors kept in the ordinary course of business?

A Yes.

Q Do you recognize that memorandum?

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A Yes.

Q And does that memorandum in part state that no commissions will be paid until eight thousand customer accounts are acqaired by Galaxy?

A That's correct.

MR. LERNER: I would like to move its admission.

THE COURT: What is the date of that?

MR. LERNER: December 18, '72.

VOIR DIRE EXAMINATION

BY MR. GOIDEL:

Q Who authorized the distribution of this?

A If I can see it again?

Q Sure (handing it to witness).

A Steven Roth.

Q Did anybody authorize Steven Roth to authorize it?

A They did not.

MR. LERNER: Do you have any objection?

MR. GOIDEL: No.

THE CLERK: So marked, Plaintiff's Exhibit number 22 in evidence.

(So marked.)

BY MR. LERNER:

Q Mr. Lieberman, was the policy not to pay commis-

sions until the company has eight thousand accounts a policy which was discussed at the Executive Board?

MR. GOIDEL: Objection. That has already been testified to previously.

THE COURT: Let me hear that.

(Question read.)

MR. GOIDEL: It has already been testified to. We went into it with regard to Mr. Kirsch's presence and so forth, with regard to that proposed meeting.

MR. LERNER: I read the transcript.

THE COURT: You say it is not in the transcript?

MR. LERNER: I couldn't find it. Not in this specific areas, your Honor. What harm will it do to go over it?

MR. GOIDEL: That is the part where we even went into the question of veto.

THE COURT: Well, if there are inconsistencies between early and prior testimony, you know what you can do.

MR. GOIDEL: Sure.

THE COURT: All right. Go ahead.

Q Was the policy discussed at the Executive Board?

A Yes, it was.

Q And this id December 18, was Mr. Kirsch still

with the company at that time?

A Yes, he was.

Q Was Mr. Kirsch present at the Board meeting at which this was discussed, to the best of your knowledge?

A He was.

Q And this letter was mailed out to all Distributors and Field Managers?

A Yes, I know it was.

MR. LERNER: I would like to mark, and I will be just about finished, a second memorandum dated January 23, 1973, addressed to All Distributors and Field Managers.

THE CLERK: So marked, Plaintiff's Exhibit number 23 for identification.

(So marked.)

Q Do you recognize this document?

A Yes, I recognize this document.

Q Was it mailed out to those people indicated at the upper portion of the document, Field Managers and Distributors?

A I believe it was, yes.

Q Mr. Lieberman, does this document refresh your recollection as to how many accounts, as of January 23, 1973, Galaxy had accumulated?

A No, it does not.

Q All right, let me ask you this question, Mr. Lieberman: There is a statement in this document to the following effect --

MR. GOIDEL: Objection.

MR. LERNER: Excuse me. This is a tremendous learning process for me, your Honor. Thank you. I appreciate Mr. Goidel's objection.

I would like to move this document into evidence.

MR. GOIDEL: I have no objection.

MR. PADILLA: No objection.

THE CLERK: So marked in evidence, Plaintiff's Exhibit number 23.

(So marked.)

BY MR. LERNER:

Q Looking at this document, are there any inaccuracies?

A Yes.

Q Would you state what the inaccuracy is?

A "As you already know, the pilot program is in full operation, and fellow Distributors and Field Managers have established over 1400 accounts, and are growing every day."

That is not an inaccuracy, that is correct, I guess, so there are no inaccuracies.

Q Does this letter, then, refresh your recollection as to how many accounts Galaxy had on January 23, 1973?

A Yes, it does.

Q How many?

A Over 1400.

Q How long had Galaxy been in operation when this memorandum was delivered?

A You mean retail operation?

Q In operation since its inception?

A Oh, I'm sorry.

January 23, about a year and two months -- fourteen months.

Q Fifteen months, fourteen months would be conservative?

A That's correct.

Q So in fourteen months Galaxy had acquired 1400 customer accounts, is that true; yes or no?

A No. I said more than 1400 accounts.

Q Over 1400 accounts?

A Over 1400.

Q Whatever is stated here, over 1400, is that true?

A Yes.

Q The Executive Board projected that by March or April, late March or April, an additional, let's say, 6,000

accounts would be accumulated by the company; is that correct?

A That's correct.

Q At the time of Galaxy's demise in August of 1973, how many customers did it have in toto?

A The last estimation we had was four thousand, eight hundred.

(continued on next page.)

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REDIRECT EXAMINATION

BY MR. LERNER (Cont'd):

Q Four thousand eight hundred?

A Yes.

MR. LERNER: Your Honor, unless I can't read my handwriting, I think -- I think that I'm through. Thank you. Thank you for your indulgence, by the way, as well.

RECROSS-EXAMINATION

BY MR. GOIDEL:

Q Sir, Mr. Lerner on his redirect examination just now read you part of page 391 of your original testimony, more particularly, the following question.

"Was Plaintiff's Exhibit 7 in the form you are looking at it now given to the executive board for their approval?"

And you ranswer was, "No."

Do you recall giving that testimony originally?

A That's correct.

Q Yet today, sir, you said it was shown to the executive board for its approval?

A The content was shown.

Q Which is accurate, sir?

A The fact that it was not shown in that form to

the executive board.

Q What was shown to the executive board and when?

A I believe --

MR. LERNER: Objection, your Honor. We read his testimony. It was the typewritten format of the article.

MR. GOIDEL: Your Honor, let him testify. I frankly am very confused.

THE COURT: Well, at 392, take a look at 392. Line 7 and following.

MR. GOIDEL: I'm sorry, sir, what lines?

What was discussed?

BY MR. GOIDEL:

Q Well, do I understand then, sir, it is -- it was presented in a form other than as it appeared specifically in the newspaper?

A No, it was not the newspaper article.

Q It was not the newspaper article but the contents that was to go into the newspaper article that was discussed?

A That's correct.

Q What day was this discussion had?

MR. LERNER: He's testified he does not recall. He's testified.

MR. GOIDEL: This is cross-examination. I have a right to go into this witness's credibility.

MR. LERNER: He has reason. He's already asked the question and I suppose --

MR. GOIDEL: You ressurected it this morning.

MR. LERNER: I suppose the proper objection would be harassing the witness.

THE COURT: Well, I can't say it is harassment. You did go into the subject again and I am not altogether sure what Mr. Goidel has in mind, but I think he has the right to at least clarify anything that may be left less clear as a result.

MR. LERNER: I'll withdraw the objection.

BY MR. GOIDEL:

Q Sir, what date was this meeting?

A I cannot recall.

Q Name for me all persons present at this meeting when this was specifically discussed? That is, at the time that it was specifically discussed.

A I know I was there. Charles Horowitz was there. Ralph Avni was there. Bruce Katz was there. They I know definitely. The rest I cannot -- during the discussion, John Celano was there. Franz Guach was there. Don Kirsch was there.

Q During the whole discussion?

A Yes. During the whole discussion.

Q Concerning this ad?

A That's correct.

Q We are not talking about their being present at the meeting at which many things were discussed, one of which items might have been this.

You are saying that Mr. Kirsch was physically present when the ad was being discussed?

A During the discussion, that's correct.

Q During the discussion about the ad?

A That's correct.

Q Is that correct?

A That's correct.

Q What did Mr. Kirsch say?

A I cannot recall exactly what he said.

Q Give me the substance of what he said.

A Well, he did more listening than talking because Mr. Katz was also introducing a new rule and regulation. Remember, I testified that Rule 21 came into effect at the same time. Mr. Katz was making it clear, if Mr. Kirsch was speaking, he was asking questions, that's correct. He was asking questions about what the effects might have of the rule and regulation.

Q The effect that Rule 21 might have?

A That's correct. It was all tied together in one big discussion.

Q Fine, sir. I asked you, on Thursday, if you would bring the shareholders' agreement to Court.

A That's correct.

Q And you showed me this morning what purports to be an agreement dated the 24th day of August, 1971, between you, Mr. Rosenthal and Mr. Avni.

A That's correct.

Q Is that correct?

A Yes.

Q I show you this, sir. Is that a copy or a duplicate original of an agreement executed by the three principals of Galaxy Foods, Inc.

A That's exactly what it is.

Q And you recognize the signatures of each of the parties on the last page, sir?

A I do.

Q And do you recognize them to be your signature and Mr. Avni's signature and Mr. Rosenthal's signature?

A I do.

Q And is this the only shareholders' agreement entered into between you, Mr. Avni and Mr. Rosenthal?

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A That's correct.

MR. GOIDEL: I offer this in evidence.

MR. LERNER: I have no objection.

THE CLERK: Defendant Exhibit O in Evidence.

(So marked.)

Q Sir, are you familiar with the terms of this agreement?

A It's been quite a while since I've seen them but I was familiar when I signed them.

Q Now, sir, there is a paragraph 6. Paragraph 6 reads as follows:

"Each of the parties agrees to elect each other to the board of directors of the corporation. At no time shall the number of directors eceed three members. Two directors shall constitute a quorum. All action by the board of directors shall require the unanimous vote of the quorum."

Do you recall that paragraph?

A That's correct.

Q We also have, sir, the by-laws of the corporation contained in Defendants' Exhibit J. I show this to you again.

Sir, was the shareholders' agreement now marked as Defendants' Exhibit O ever modified or amended in writing?

A Not to my knowledge, it was not.

Q Were the by-laws of the corporation as contained in Exhibit J ever amended or modified in writing?

A Not the by-laws, no.

Q How about orally?

A No.

Q Sir, did you ever seek counsel as relates to the method of operating the coproration, that is, inquire as to the obligations, the guts and the functions of the board of directors?

Did you see advice of counsel as relates to that?

A Not specifically that I can remember.

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(Continued on next page.)

Q Sir, did anybody ever tell you that the board of directors may not delegate their authority to another board or another group of individuals? Did anybody ever tell --

MR. LERNER: Objection. Calls for a hearsay.

Q Did you ever make such an inuiry?

THE COURT: Well, he -- all right. First ask that. Did you ever --

Q Did you ever make an inquiry of anyone as relates to the ability of a board of directors to delegate its authority?

A No, I don't recall ever making such an inquiry.

Q Did the board of directors ever delegate its authority?

A I --

MR. LERNER: That may call for a legal conclusion, your Honor.

THE COURT: In a way.

MR. LERNER: There is testimony as to what the executive board did and whether he knows whether that was inherent power of the board of directors prior to it being -- prior to the executive board exercising what it did -- might be a legal conclusion.

MR. GOIDEL: It is the --